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ONTARIO
LABOUR RELATIONS BOARD
REPORTS

Annual
Consolidated Index 2008

Ontario

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ONTARIO
LABOUR RELATIONS BOARD
REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Annual
Consolidated Index 2008

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports,* Butterworth & Co., Toronto

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MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL .....(Nov./Dec.) 863

Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Trade Union – After the parent trade union (UBC) assumed supervision over the Local, the Local brought an application to the Board under s. 147 and 149 – Two matters were at issue: the Local's refusal to provide data in a digital format to UBC (ULTRA issue) and the fact that persons were permitted by the Local to work in its area without becoming, or being permitted to become, members of the Local ("permit workers" issue) – The Board noted the underlying tension between UBC and the Local since UBC had reduced the number of locals and required them to join together into two regional councils – Although the parties settled the Ultra issue, the Board noted that the lack of forthrightness on the part of the Local and the lengthy delay in putting forward any sort of explanation was inappropriate – The Board found that the Local failed in its obligation to provide full disclosure to UBC of an issue in which it had a legitimate interest and a right to be informed – Such a refusal gave UBC just cause to restrict the autonomy of the Local by way of supervision but not to the extent of the one that was imposed – The Board made a more limited order addressing the production of information about permit workers from the Local to UBC – Declaration made

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL UNION 1256; RE ARNOLD BONGERS ET AL, AS THE TRUSTEES OF THE CARPENTERS' LOCAL 1256 PENSION PLAN, THE CARPENTERS' LOCAL 1256 VACATION PAY PLAN AND THE CARPENTERS' LOCAL 1256 WELFARE PLAN .....(Sept./Oct.) 715

Bar – Bargaining Unit – Certification – Judicial Review – The employer argued on judicial review that the Board must determine whether a bar existed pursuant to s. 10(3), prior to counting the votes – The court held the Board was interpreting its enabling statute; that it addressed labour relations principles in its reasons, including consequences of delay and possible prejudice to both sides; and that the Board was exercising its specialized expertise – The court did not agree that the issue was a threshold jurisdictional issue, but rather a procedural and administrative order, the type the court "should be loath to interfere along the way with" – Application dismissed

STOCK TRANSPORTATION LTD.; RE OLRB AND TEAMSTERS LOCAL UNION NO. 938.....(Jul./Aug.) 601

Bar – Bargaining Unit – Certification – The Teamsters sought to certify employees of Stock Transportation in the City of Toronto – The application came on the heels of three earlier applications with similar bargaining unit descriptions – Stock argued that it had no employees in the proposed bargaining unit, or that the application was barred pursuant to s. 10(3) of the Act – A representation vote was ordered and the ballot box was sealed – The Board rejected the employer's "no employees" submission because the application, like the earlier ones, relied on a "City of Toronto" description but implicitly specified municipal addresses – The union could not have intended to apply for a bargaining unit with no employees – The Board held that in counting the ballots, any prejudice to the employer was outweighed by the prejudice to the employees arising from the potential of a longer bar, given that a determination of the bar issue under s. 10(3) or 10(3.1) would require days of hearing – A counting of the ballots, without prejudice to any of the employer's positions, could also mean the end of the matter – Vote count ordered

STOCK TRANSPORTATION LTD.; RE TEAMSTERS LOCAL UNION NO. 938 .....(Jul./Aug.) 569

Bar – Certification – Membership Evidence – Voluntary Recognition – CUPW asked the Board to find that the voluntary recognition agreement between the UWU and the employer was not a bar to the certification – The Board found there was a different and less stringent evidentiary burden to establish representational entitlement pursuant to section 66 than in furtherance of an application for certification – The Board found that neither the fact that the union registration cards were filled in and signed prior to knowledge of who the employer was to be, nor the fact that the employer's name was added to the registration cards once it became known, rendered the membership evidence invalid or improper – The voluntary recognition agreement entered into by the Employer and the UWU was upheld – Application for Certification dismissed

DISTINCTION SERVICE PLUS INC.; RE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 15

Bar – Certification – Representation Vote – The employer and incumbent trade union took the position that the application for certification was barred because CUPE had applied seven weeks earlier for the same units – In the first set of applications the Board ordered a vote (sealing the ballots), but questioned whether there was an appearance of 40% because of undated cards – CUPE wrote requesting that the first applications be dismissed and the Board took this as a concession that there was not an appearance of more than 40% – The Board found no bar applicable to the present application since: the votes were not counted (a condition under s. 10); section 7(10) [withdrawal after a vote] did not apply, as the vote was a nullity since there was no evidence of an appearance of

40% – Additionally, since the employees' wishes had never been tested, and there have been no repetitious withdrawals, there was no reason to exercise the Board's discretion to bar the applicant – Matter continues

SODEXO CANADA LIMITED; RE CUPE; RE LIUNA Local 837 .....(Nov./Dec.) 829

Bargaining Rights – Constitutional Law – Construction Industry – Employer – Termination – The Independent Electricity Market Operator, currently called the Independent Electricity System Operator (IESO), sought a declaration that it was a non-construction employer because it was a consumer of construction services and not a vendor of same – If such a declaration were to issue from the Board, the unions reserved the right to challenge the constitutionality of the non-construction employer provisions – The IESO has two main functions: (1) to ensure the reliable operation of the electrical power system in Ontario; and (2) to operate the wholesale electricity market in Ontario (including a price-setting function) – The IESO is neither a generator nor a transmitter of electricity; it ensures the reliability of the electrical power system in the province through market rules and operating agreements with various market participants – There was no dispute that the IESO engages contractors from time to time to perform construction work for its own benefit – The Board found that market fees paid to the IESO by market participants are not the kind of compensation contemplated by the definition of a non-construction employer – The Board found the situation in the present case to be similar to government funding provided to a school board that the board uses to pay for construction activity: the funds are not paid in order for construction work to be performed for the benefit of the giver of the funds – Non-construction employer declaration granted – Matter referred to Registrar to schedule constitutional argument

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE LIUNA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059..... (Mar./Apr.) 210

Bargaining Rights – Constitutional Law – Termination – An employee in the construction industry applied for termination of bargaining rights – The union argued that on the application date, the applicant's work was within federal jurisdiction – The applicant was installing sensors to monitor temperature and humidity in computerized offices used by a federal intelligence/security agency, a core federal undertaking – The removal of labour relations from provincial competence is exceptional, and is only appropriate when the subsidiary's work is integral to a core federal undertaking – The Board held that the sensor system was not integral to the core federal undertaking – The construction employer did no work that was directly or indirectly related to the agency's federal purposes in intelligence and security – Therefore, the employer's labour relations were governed by the *Labour Relations Act* and by the Board – Matter continues

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; RE THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 .....(Jul./Aug.) 563

Bargaining Rights – Employer Initiation – Evidence – Termination – In an application seeking to terminate the bargaining rights of the union, the Board found that although there was very little direct evidence establishing that the employer initiated the application, the union was perfectly entitled to meet its onus through circumstantial evidence – The employee's evidence concerning his motivation for filing the application was not credible – He was not honest regarding how he became aware that a termination application could be filed, when such an application would be timely under the LRA and in describing his

alleged motivation for bringing the application – The only natural explanation the Board could draw from his dishonesty was the desire to cover up the fact that his employer initiated the application – Application dismissed

2890275 CANADA INC. O/A ENER-TECH; RE PATRICK POISSON RE IBEW, LOCAL 586 ..... (Mar./Apr.) 123

Bargaining Unit – Bar – Certification – Judicial Review – The employer argued on judicial review that the Board must determine whether a bar existed pursuant to s. 10(3), prior to counting the votes – The court held the Board was interpreting its enabling statute; that it addressed labour relations principles in its reasons, including consequences of delay and possible prejudice to both sides; and that the Board was exercising its specialized expertise – The court did not agree that the issue was a threshold jurisdictional issue, but rather a procedural and administrative order, the type the court "should be loath to interfere along the way with" – Application dismissed

STOCK TRANSPORTATION LTD.; RE OLRB AND TEAMSTERS LOCAL UNION NO. 938 ..... (Jul./Aug.) 601

Bargaining Unit – Bar – Certification – The Teamsters sought to certify employees of Stock Transportation in the City of Toronto – The application came on the heels of three earlier applications with similar bargaining unit descriptions – Stock argued that it had no employees in the proposed bargaining unit, or that the application was barred pursuant to s. 10(3) of the Act – A representation vote was ordered and the ballot box was sealed – The Board rejected the employer's "no employees" submission because the application, like the earlier ones, relied on a "City of Toronto" description but implicitly specified municipal addresses – The union could not have intended to apply for a bargaining unit with no employees – The Board held that in counting the ballots, any prejudice to the employer was outweighed by the prejudice to the employees arising from the potential of a longer bar, given that a determination of the bar issue under s. 10(3) or 10(3.1) would require days of hearing – A counting of the ballots, without prejudice to any of the employer's positions, could also mean the end of the matter – Vote count ordered

STOCK TRANSPORTATION LTD.; RE TEAMSTERS LOCAL UNION NO. 938 ..... (Jul./Aug.) 569

Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Status – Unfair Labour Practice – The Board issued a number of preliminary and procedural rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees provided by the responding party at the regional certification meeting because of the prejudice the applicants would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

CLEAN WATER WORKS INC.; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 171

Bargaining Unit – Certification – Construction Industry – Reconsideration – Two unions sought certification for the same employees in non-ICI units in two adjacent Board Areas (9 and

11) – The employer agreed with the bargaining units proposed for Board Area 11, and provided identical Schedule "A" lists in response to each application; however, the employer disagreed that the scope of any bargaining unit should encompass Board Area 9 and asserted that it had no employees working in that Area on the application date – In an earlier decision, the Board (differently constituted) concluded that it had no option but to issue a certificate to each applicant for Board Area 11 – In a continuation of the proceeding, the parties argued about whether it was necessary for each applicant to establish that at least one employee performed work of its trade in Board Area 9 for a majority of his or her working day and what effect this would have on the earlier certificates – The employer argued the Board should reconsider its earlier decision so it could ascertain the "majority of the day" issue – The applicants asserted that the responding party cannot resile from its original position, and the Board should find that someone worked in each Area on the application date, and should either issue two new certificates relating to Board Area 9 or revoke the earlier certificates and issue fresh ones for the broader geographic scope – The Board held that it has never required an applicant applying for a bargaining unit encompassing more than one Board Area to pass a "majority of the day" threshold with respect to more than work in a particular trade – The *Gilvesy* focus is on *what work* was performed, not *where* – The appropriate approach for the Board would be to reconsider the earlier certificates, revoke them and re-issue new certificates reflecting the expanded geographic scope – This should not be an opportunity for the responding party to renege on an earlier position – Hearing directed to ascertain if applicants had any employees performing work in Board Area 9 on the application filing date

BONNECHERE EXCAVATING INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 (May/June) 326

Bargaining Unit – Certification – Construction Industry – Settlement – The union applied for a bargaining unit outside the ICI sector that included carpenters and labourers, trades which, to the union's knowledge, were the only unrepresented trades working on the date of application – The Employer's response accepted the Union's proposed bargaining unit and the Board determined the bargaining unit that was appropriate for collective bargaining on that basis – At the Regional Certification Meeting the parties confirmed their agreement with respect to the bargaining unit description and when post-RCM submissions were made, the Employer's challenge to the status of one individual was that he spent the majority of his day doing operating engineer's work – The Board noted, in determining whether to amend the bargaining unit, it must reconcile two completing principles: 1) that parties should be bound to the agreements they make; and 2) that outside the ICI sector, construction trade unions must seek bargaining rights within a Board area either for their own craft or for all unrepresented trades at work on the date of application – The Board found that the first principle must yield to the second for the following reasons: first, the labour relations consequences of abrogating the second principle would create too many jurisdictional disputes; second, the individual in question would be in a position where the individual would be highly unlikely to be represented by a bargaining agent; third, the second principle avoids conflicts over bargaining unit descriptions by maintaining a bright line approach (if a craft union applies for more than their trade, they must take all unrepresented trades) – Finally, the Board concluded that a standard bargaining unit for the non-ICI sectors of the construction industry serves to avoid manoevering, gerrymandering, positioning and tactical manipulation in the certification process – Bargaining unit description amended – Matter continues

RAYMAC CUSTOM HOMES AND/OR RAYMAC CORPORATION; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 686

Bargaining Unit – Certification – Practice and Procedure – Union applied for an all employee unit where the employer had two operations: a nursing home and retirement home – Employer argued that only a two bargaining unit structure was appropriate – After the ballots were counted, a majority of employees in the nursing home voted in the union's favour, while the employees in the retirement home and all employee unit were against the union – The parties then adopted each others' positions – The Board permitted the change of positions, following *Martha's Garden* and *Morrow Transport* and noted that change of position cases are rare and are a natural outcome of the Board's processes which are designed to ensure that certification cases get dealt with quickly, effectively and without the requirement of unnecessary litigation – Finally, the Board found that a two-unit structure was appropriate (particularly given that the employer had argued, albeit at different times, that both an all employee and a two unit structure were appropriate) – Application granted, in part

NUTRA SERVICES INC.; RE SEIU LOCAL 1 CANADA ..... (Jul./Aug.) 550

Bargaining Unit – Certification – *Prima Facie* Motion – Reconsideration – The union applied to consolidate six bargaining units into three – The employer brought a "no *prima facie* case" motion – The Board has the power to reconsider its past decisions, including certification decisions providing bargaining unit descriptions – However, certificates are spent when the parties enter into their first collective agreement – The bargaining units negotiated by the parties supersede the ones described in the Board's certificates – Hence the current bargaining units, as described in the collective agreements negotiated between the parties, supersede any consolidated units that the Board could order through its reconsideration power – The union has not made out a *prima facie* case for consolidating its bargaining units, which was the relief sought – Motion granted; application dismissed

KINGSTON WHIG STANDARD; RE KINGSTON TYPOGRAPHICAL UNION, LOCAL 30204 ..... (Jul./Aug.) 529

Bargaining Unit – Certification – The parties sought an interim certificate pending the resolution of the geographic scope (town v. county) by mutual agreement or as determined by the Board – The Board noted that it is most often requested to certify unions on an interim basis when there are outstanding disputes related to certain classifications – In this case, the Board saw no impediment to certifying the bargaining agent on an interim basis where it was clear the outcome of the dispute regarding the geographic scope did not impact on the entitlement to certification – Interim certificate issued for bargaining unit not in dispute (town)

BFI CANADA INC.; RE TEAMSTERS LOCAL UNION NO. 419 ..... (Sept./Oct.) 615

Bargaining Unit – Construction Industry – Local 183 applied under s. 158(2) [non-ICI] for a bargaining unit of all construction labourers working in Board Areas 9 and 18 – On the application filing date there were two employees working – one in each Area – The responding party argued that the appropriate bargaining unit under section 158(2) must be a single geographic Board Area, and since there was only one employee in each area, the application must be dismissed pursuant to s. 9(1) – The Board found that the reference to a geographic area in s. 158(2) provides for minimal coverage encompassed in a certificate and does not foreclose the Board from making a determination that a bargaining unit

description that goes beyond one geographic area is appropriate – This view is consistent with the requirement under s. 160 to issue one certificate in the ICI and another in relation to all other sectors in the appropriate geographic area or areas – Application proceeds

HAVENWOOD HOMES; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Mar./Apr.) 201

Certification – Bar – Bargaining Unit – Judicial Review – The employer argued on judicial review that the Board must determine whether a bar existed pursuant to s. 10(3), prior to counting the votes – The court held the Board was interpreting its enabling statute; that it addressed labour relations principles in its reasons, including consequences of delay and possible prejudice to both sides; and that the Board was exercising its specialized expertise – The court did not agree that the issue was a threshold jurisdictional issue, but rather a procedural and administrative order, the type the court "should be loath to interfere along the way with" – Application dismissed

STOCK TRANSPORTATION LTD.; RE OLRB AND TEAMSTERS LOCAL UNION NO. 938.....(Jul./Aug.) 601

Certification – Bar – Bargaining Unit – The Teamsters sought to certify employees of Stock Transportation in the City of Toronto – The application came on the heels of three earlier applications with similar bargaining unit descriptions – Stock argued that it had no employees in the proposed bargaining unit, or that the application was barred pursuant to s. 10(3) of the Act – A representation vote was ordered and the ballot box was sealed – The Board rejected the employer's "no employees" submission because the application, like the earlier ones, relied on a "City of Toronto" description but implicitly specified municipal addresses – The union could not have intended to apply for a bargaining unit with no employees – The Board held that in counting the ballots, any prejudice to the employer was outweighed by the prejudice to the employees arising from the potential of a longer bar, given that a determination of the bar issue under s. 10(3) or 10(3.1) would require days of hearing – A counting of the ballots, without prejudice to any of the employer's positions, could also mean the end of the matter – Vote count ordered

STOCK TRANSPORTATION LTD.; RE TEAMSTERS LOCAL UNION NO. 938 .....(Jul./Aug.) 569

Certification – Bar – Membership Evidence – Voluntary Recognition – CUPW asked the Board to find that the voluntary recognition agreement between the UWU and the employer was not a bar to the certification – The Board found there was a different and less stringent evidentiary burden to establish representational entitlement pursuant to section 66 than in furtherance of an application for certification – The Board found that neither the fact that the union registration cards were filled in and signed prior to knowledge of who the employer was to be, nor the fact that the employer's name was added to the registration cards once it became known, rendered the membership evidence invalid or improper – The voluntary recognition agreement entered into by the Employer and the UWU was upheld – Application for Certification dismissed

DISTINCTION SERVICE PLUS INC.; RE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 15

Certification – Bar – Representation Vote – The employer and incumbent trade union took the position that the application for certification was barred because CUPE had applied seven weeks earlier for the same units – In the first set of applications the Board ordered a vote (sealing the ballots), but questioned whether there was an appearance of 40% because of undated cards – CUPE wrote requesting that the first applications be dismissed and the Board took this as a concession that there was not an appearance of more than 40% – The Board found no bar applicable to the present application since: the votes were not counted (a condition under s. 10); section 7(10) [withdrawal after a vote] did not apply, as the vote was a nullity since there was no evidence of an appearance of 40% – Additionally, since the employees' wishes had never been tested, and there have been no repetitious withdrawals, there was no reason to exercise the Board's discretion to bar the applicant – Matter continues

SODEXO CANADA LIMITED; RE CUPE; RE LIUNA Local 837 .....(Nov./Dec.) 829

Certification – Bargaining Unit – Construction Industry – Practice and Procedure – Status – Unfair Labour Practice – The Board issued a number of preliminary and procedural rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees provided by the responding party at the regional certification meeting because of the prejudice the applicants would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

CLEAN WATER WORKS INC.; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Mar./Apr.) 171

Certification – Bargaining Unit – Construction Industry – Reconsideration – Two unions sought certification for the same employees in non-ICI units in two adjacent Board Areas (9 and 11) – The employer agreed with the bargaining units proposed for Board Area 11, and provided identical Schedule "A" lists in response to each application; however, the employer disagreed that the scope of any bargaining unit should encompass Board Area 9 and asserted that it had no employees working in that Area on the application date – In an earlier decision, the Board (differently constituted) concluded that it had no option but to issue a certificate to each applicant for Board Area 11 – In a continuation of the proceeding, the parties argued about whether it was necessary for each applicant to establish that at least one employee performed work of its trade in Board Area 9 for a majority of his or her working day and what effect this would have on the earlier certificates – The employer argued the Board should reconsider its earlier decision so it could ascertain the "majority of the day" issue – The applicants asserted that the responding party cannot resile from its original position, and the Board should find that someone worked in each Area on the application date, and should either issue two new certificates relating to Board Area 9 or revoke the earlier certificates and issue fresh ones for the broader geographic scope – The Board held that it has never required an applicant applying for a bargaining unit encompassing more than one Board Area to pass a "majority of the day" threshold with respect to more than work in a particular trade – The *Gilvesy* focus is on *what work* was performed, not *where* – The appropriate approach for the Board would be to reconsider the earlier certificates, revoke them and re-issue new certificates reflecting the expanded geographic scope – This should not be an opportunity for the responding party to renege on an earlier position – Hearing

directed to ascertain if applicants had any employees performing work in Board Area 9 on the application filing date

BONNECHERE EXCAVATING INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 (May/June) 326

Certification – Bargaining Unit – Construction Industry – Settlement – The union applied for a bargaining unit outside the ICI sector that included carpenters and labourers, trades which, to the union's knowledge, were the only unrepresented trades working on the date of application – The Employer's response accepted the Union's proposed bargaining unit and the Board determined the bargaining unit that was appropriate for collective bargaining on that basis – At the Regional Certification Meeting the parties confirmed their agreement with respect to the bargaining unit description and when post-RCM submissions were made, the Employer's challenge to the status of one individual was that he spent the majority of his day doing operating engineer's work – The Board noted, in determining whether to amend the bargaining unit, it must reconcile two completing principles: 1) that parties should be bound to the agreements they make; and 2) that outside the ICI sector, construction trade unions must seek bargaining rights within a Board area either for their own craft or for all unrepresented trades at work on the date of application – The Board found that the first principle must yield to the second for the following reasons: first, the labour relations consequences of abrogating the second principle would create too many jurisdictional disputes; second, the individual in question would be in a position where the individual would be highly unlikely to be represented by a bargaining agent; third, the second principle avoids conflicts over bargaining unit descriptions by maintaining a bright line approach (if a craft union applies for more than their trade, they must take all unrepresented trades) – Finally, the Board concluded that a standard bargaining unit for the non-ICI sectors of the construction industry serves to avoid manoevering, gerrymandering, positioning and tactical manipulation in the certification process – Bargaining unit description amended – Matter continues

RAYMAC CUSTOM HOMES AND/OR RAYMAC CORPORATION; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 686

Certification – Bargaining Unit – Practice and Procedure – Union applied for an all employee unit where the employer had two operations: a nursing home and retirement home – Employer argued that only a two bargaining unit structure was appropriate – After the ballots were counted, a majority of employees in the nursing home voted in the union's favour, while the employees in the retirement home and all employee unit were against the union – The parties then adopted each others' positions – The Board permitted the change of positions, following *Martha's Garden* and *Morrow Transport* and noted that change of position cases are rare and are a natural outcome of the Board's processes which are designed to ensure that certification cases get dealt with quickly, effectively and without the requirement of unnecessary litigation – Finally, the Board found that a two-unit structure was appropriate (particularly given that the employer had argued, albeit at different times, that both an all employee and a two unit structure were appropriate) – Application granted, in part

NUTRA SERVICES INC.; RE SEIU LOCAL 1 CANADA .....(Jul./Aug.) 550

Certification – Bargaining Unit – *Prima Facie* Motion – Reconsideration – The union applied to consolidate six bargaining units into three – The employer brought a "no *prima facie* case" motion – The Board has the power to reconsider its past decisions, including

certification decisions providing bargaining unit descriptions – However, certificates are spent when the parties enter into their first collective agreement – The bargaining units negotiated by the parties supersede the ones described in the Board's certificates – Hence the current bargaining units, as described in the collective agreements negotiated between the parties, supersede any consolidated units that the Board could order through its reconsideration power – The union has not made out a *prima facie* case for consolidating its bargaining units, which was the relief sought – Motion granted; application dismissed

KINGSTON WHIG STANDARD; RE KINGSTON TYPOGRAPHICAL UNION, LOCAL 30204 ..... (Jul./Aug.) 529

Certification – Bargaining Unit – The parties sought an interim certificate pending the resolution of the geographic scope (town v. county) by mutual agreement or as determined by the Board – The Board noted that it is most often requested to certify unions on an interim basis when there are outstanding disputes related to certain classifications – In this case, the Board saw no impediment to certifying the bargaining agent on an interim basis where it was clear the outcome of the dispute regarding the geographic scope did not impact on the entitlement to certification – Interim certificate issued for bargaining unit not in dispute (town)

BFI CANADA INC.; RE TEAMSTERS LOCAL UNION NO. 419 ..... (Sept./Oct.) 615

Certification – Certification Where Act Contravened – Construction Industry – Remedies – Unfair Labour Practice – The applicant chose to conduct its organizing drive through salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

LECOMPTE ELECTRIC INC.; RE IBEW, LOCAL 586; RE CLAYTON BLOOM ..... (Mar./Apr.) 234

Certification – Certification Where Act Contravened – Construction Industry – Remedies – Unfair Labour Practice – The applicant chose to conduct its organizing drive through salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of

the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

LECOMPTE ELECTRIC INC.; RE IBEW, LOCAL 586; RE CLAYTON BLOOM ..... (Mar./Apr.) 234

Certification – Construction Industry – Dependent Contractor – Status – In this application for certification, the Applicant alleged that three individuals, McGowan, Page and Baker were all dependent contractors and therefore employees of Salzburg – The individuals conducted 90 to 100% of their work for Salzburg – McGowan and Page both provided work to Salzburg through business entities and were free to accept and refuse any projects, however, they rarely refused projects from Salzburg – There was very little supervision – The Board found that McGowan was a dependant contractor for the purposes of the Labour Relations Act – He was in a position of economic dependence upon Salzburg – Their relationship exhibited the same hallmarks as that of an hourly employee – Conversely, the Board found that Page and Baker were not employees of Salzburg – The evidence clearly showed that Page was the employer of Baker – All direction was provided by Page and not Salzburg – Page was an independent contractor, who had entered into a voluntary agreement with the Applicant and therefore was bound by a collective agreement – Matter continues

SALZBURG INTERIORS & FURNITURE LTD.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA ..... (Jan./Feb.) 96

Certification – Construction Industry – Employer – The Labourers sought certification of a unit of employees the union alleged were employed by one of the Monarch companies – Both Monarch and the intervenor challenged the application, arguing that the real employer was the intervenor, a personnel placement agency – The Board found that the employees were hired by the intervenor and assigned to Monarch; Monarch had no employees of its own working at its sites; disciplinary issues were handled by the intervenor; the intervenor re-assigned employees when they were no longer needed at Monarch; the intervenor bore responsibility for remuneration, paying the employer share of benefits, wages and bonuses – The Board was satisfied that fundamental control over the employees rested with the intervenor – Application dismissed

MONARCH CORPORATION AND MONARCH DEVELOPMENT CORPORATION; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE THE K.A.S. GROUP OF COMPANIES ..... (Jan./Feb.) 76

Certification – Construction Industry – Employer Support – Unfair Labour Practice –The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

PRE-ENG CONTRACTING LTD.; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA;

LIUNA, LOCAL 506; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNTED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (Mar./Apr.) 284

Certification – Construction Industry – Evidence – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ..... (Nov./Dec.) 803

Certification – Construction Industry – Judicial Review – Mootness – Practice and Procedure – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted ([2007] OLRB Rep. Mar/Apr 459) – Subsequent to the Divisional Court determining the Board had discretion to consider late-filed information pursuant to s. 128.1(3)), the Board reconsidered and revoked the certificate issued to the union and set the matter down for a Regional Certification meeting as it was unable to determine the number of employees in the bargaining unit – The Court of Appeal found these post-judicial review events rendered the matter before it moot, because the underlying controversy (whether the Board can consider and act on the information) had already been acted upon by the Board – The Court also decided not to exercise its discretion to decide the moot appeal on the merits because a) an adversarial context still existed; and b) while the issues (standard of review and interpretation of the s. 128.1) are important, they do not raise questions of broad social and constitutional importance, and they are not evasive of review – Finally the court cautioned that the decision was not an affirmation of Divisional Court's finding that the appropriate standard of review was correctness – The court made it clear that deference was owed to the Board on these types of issues – Appeal dismissed

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819 AND OLRB ..... (Mar./Apr.) 306

Certification – Construction Industry – Judicial Review – Reconsideration – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB.....(Nov./Dec.) 859

Certification – Construction Industry – Judicial Review – Status – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB .....(Nov./Dec.) 858

Certification – Construction Industry – Practice and Procedure – Timeliness – The IUOE asked the Board to refuse to consider the response to its application for certification since the respondent had failed to file within the time limits set out by the Act and the Board's Rules of Procedure – The applicant had contemporaneously filed an industrial application and a construction application for certification – The Board reviewed its jurisprudence on the exercise of its discretion – In the instant case, the Board held that the respondent's error in believing there to be only one application for certification was reasonable in the circumstances – The Board found that the IOUE contributed to the respondent's confusion by simultaneously delivering multiple applications, each with a cover letter on the same letterhead with the same solicitor's file number on it – The Board held that applicant could have alerted the respondent to fact that there were two applications – The Board exercised its discretion and considered the information contained in the late-filed response – Matter continues

CARMAN CONSTRUCTION INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 .....(Jan./Feb.) 1

Certification – Construction Industry – Practice and Procedure – The Sheet Metal Workers International Association (SMWIA) sought to displace the Carpenters performing roofing or siding work in the low rise portion of the residential sector – The Carpenters argued that the applications should be dismissed because the SMWIA Constitution prohibited persons compensated on a lump sum or piecework basis from being members of that union – The Board found that SMWIA had adopted the Carpenters' existing terms and conditions for residential roofers and siders, such that the workers fit into the exemption for pieceworkers and were not prohibited from membership – The responding parties argued that the individuals the SMWIA sought to represent were employers themselves, and not employees – The Board found that the nature of the relationship between pieceworkers and their helpers, on the one hand, and the responding parties, on the other, had evolved over time so the companies' argument that they had no employees could not be sustained – The Board also held that it was impossible, at this stage in the proceedings, to determine whether an individual working as a pieceworker or helper on a company's job site was employed by that company or by some other employer (or perhaps was an employer himself) – Finally, the Board refused to vary the *Gilvesy* test for voter eligibility in certification applications in the construction industry, given that the decisions ordering votes had clearly identified those eligible as "individuals who were employed by Eastern Eavestroughing" on a specific date – Since there was a potential for more than six hundred status disputes in these applications, the Board issued directions for the filing of book-in sheets and other documentary evidence which would assist in indicating who may have been at work on the date of application – Matters continue

EASTERN EAVESTROUGHING LTD.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA.....(May/June) 368

Certification – Construction Industry – Practice and Procedure – Remedial Certification – The union filed an application for certification with less than 40% membership and applied for remedial certification under s. 11 – In its application the applicant failed to identify which certification regime (s. 8 or 128.1) it was choosing – The responding party argued this was fatal – The Board found, based on statements made elsewhere in the application that the applicant had elected to proceed under s. 8 – Additionally, the Board noted that s. 128.1 specifically requires an election and since the applicant had not elected s. 128.1, the application must be dealt with under s. 8 – Matter continues

ASHBRIDGE ELECTRIC CONTRACTORS LIMITED; RE IBEW, LOCAL 353 .....(Jul./Aug.) 489

Certification – Construction Industry – Practice and Procedure – Representation Vote – Status – In light of a s. 8.1 challenge as well as status disputes in two certification applications filed by different unions involving the same employer, the Board ordered that the ballots cast in the representation vote be segregated and the ballot box sealed – Unfortunately, the ballots were not segregated – The Board ordered a second representation vote but ruled that only those individuals who cast ballots in the first vote should be eligible to cast ballots in the second vote – Second vote ordered; submissions directed

CLEAN WATER WORKS INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Sept./Oct.) 617

Certification – Construction Industry – Practice and Procedure – The Board considers whether it can and should accept a late-filed response to an application for certification –

Corporate counsel for the responding party wrote to the Board on the due date, asking for an extension so that a labour lawyer could be consulted; the response was filed one day late – The Board analyzes the impact of the Court of Appeal's decision in *Maystar* [2008] OLRB Rep. March/April 306 and holds that because of the concluding paragraphs of that decision, the Divisional Court's ruling on the interpretation of s. 128.1(3) is not binding on the Board – The Board holds, however, that the Divisional Court's interpretation of the impugned section is persuasive: the word "shall" in s. 128.1(3) is directed at the employer, not the Board, and it should be interpreted in a directory and not a mandatory manner – A mandatory approach would lead to unfair results, and would require the Board to treat the various aspects of a late-filed response differently – Accordingly, the Board finds it does have the discretion to consider late-filed information under s. 128.1(3) – In exercising its discretion to accept the delayed response, the Board considers the length of the delay; how compelling the responding party's explanation of its delay is; and the prejudice to the applicant – The Board allows the late-filed response and refers the matter to a regional certification meeting

CHRISTINA HOMES LTD. AND/OR 1357202 ONTARIO LTD. AND/OR CHRISTINA WEST JOINT VENTURE; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183.....(Nov./Dec.) 749

Certification – Construction Industry – Practice and Procedure – The applicant, applying for certification with membership cards for Local 249, mistakenly named the Carpenters' Union, Central Ontario Regional Council (in which Local 249 is not a constituent member), instead of the Carpenters District Council of Ontario, as applicant – The Board, relying on s. 112, permitted the applicant to amend its name because: the change was not a substantive one; it was a *bona fide* mistake which created no advantage for the applicant nor any prejudice to the respondent; and the mistake did not affect the integrity of the membership evidence – Motion to amend allowed, matter continues

JENSEN BUILDING LTD.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO; UBCJA.....(Nov./Dec.) 812

Certification – Construction Industry – Practice and Procedure – The Board provides reasons for the acceptance a late-filed response to an application for certification – The applicant filed two very similar applications for certification with the responding party in close proximity; the responding party asserted that it did not receive the first application, and thought the hard copy material it received was a re-sending of the first application, when in fact it was a second application; nothing on the face of the new material identified for the responding party that this was a fresh application – The Board surveys its own case law, beginning with *Air Kool*, gives consideration to the court decisions in *Maystar*, and surveys other court rulings on the interpretation of "shall" – The Board concludes it is not bound by the Divisional Court's decision in *Maystar* because the Court of Appeal explicitly invited the Board to reconcile its jurisprudence – In considering whether it has the discretion to accept a late-filed response, the Board finds that an interpretation of the word 'shall' as directory in nature: (1) is consistent with and best ensures the attainment of the purposes of the Act; (2) eliminates the unintended consequences that result from concluding that the word is mandatory; (3) is consistent with establishing a common meaning for both the English and French texts of the Act; and (4) is consistent with the principles of natural justice – The Board finds that the responding party committed an innocent error in not recognizing that the applicant had filed two applications for certification, and the responding party acted promptly in rectifying the error once it learned of the true situation – Late response allowed

WEATHERTECH RESTORATION SERVICES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 832

Certification – Construction Industry – Reconsideration – The union sought reconsideration of an earlier Board decision allowing the late filing of a response to one of two applications for certification delivered to the employer on the same day – The Board confirmed that the responding party had a legitimate reason to substantiate the late filing of its response when union counsel's cover letters to the two applications for certification were remarkably similar and the courier packaging of the two applications was virtually identical – The Board further held that the delay caused by the late filing was only two days, and not eleven days as asserted by the applicant: the union could have acted on the late filing as soon as it was received--late on a Friday afternoon of a long weekend--rather than waiting until the following Tuesday – Finally, the Board confirmed that it was not ascribing any responsibility to the applicant for the employer's confusion although it did indicate that had the union been clearer about its delivery of the two application packages, such clarity would have gone a long way to undermining the legitimacy of the employer's excuse for its confusion – Reconsideration request denied

CARMAN CONSTRUCTION INC.; RE IUOE, LOCAL 793..... (Mar./Apr.) 160

Certification – Construction Industry – Sector Determination – The first issue to be decided in this application for certification was whether the project (the construction of Goreway Station – a combined cycle gas-powered generation station) was in the ICI or electrical power systems sector – After reviewing the historical background and case law dealing with the boundaries of the electrical power systems sector, the Board addressed the factors for determining a sector dispute – The Board found that the bargaining patterns pointed strongly to the ICI sector; that work characteristics also indicated that the work fell within the ICI; and finally that end use pointed to the electrical power systems sector (although not as strongly) – The Board concluded that the bulk of the project fell in the ICI, and accordingly the application was untimely – Application dismissed

BARCLAY CONSTRUCTION GROUP INC.; RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE IUOE, LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE SNC-LAVALIN POWER ONTARIO INC.; RE IBEW, CONSTRUCTION COUNCIL OF ONTARIO; IBEW, LOCAL 353; RE GOREWAY STATION PARTNERSHIP ..... (Mar./Apr.) 136

Certification – Construction Industry – Status – The Board examined whether five individuals were employees of the responding party on the date of the application for certification, and whether they were properly included in the bargaining unit – During the Labourers' province-wide strike in the ICI sector in June of 2007, five union members were sent to work for the non-union responding party – The work done had previously been sub-contracted to a company who was bound to the provincial ICI agreement and therefore was unable to maintain the contract due to the strike – The work was subsequently done by carpenters after the five labourers, whose status was to be decided in this proceeding, were no longer required – The Board held that two unions doing the same work on different days did not act as a bar to certification so long as both unions' members were performing work falling within their jurisdiction – An application for certification is not the appropriate time to deal with work jurisdiction disputes – The Board found that the five individuals were under the direction of the responding party's representative and were doing work as its employees – The responding party asserted that (1) the employees were unlawfully working on the date of the application because they were members of

the union who were on a province-wide ICI strike; (2) the referral by the union of striking workers constituted an unlawful arrangement under section 162(2) of the Act and, having referred the workers, the union cannot rely on its own misconduct as the basis for a certification application – The Board held that the impugned actions do not frustrate the purpose of section 162(2): the prevention of agreements between a union and a union contractor to keep working through a lawful strike – In the circumstance where the non-union employer sought the referral from the union, voluntarily accepted the employees, acquired the benefit of the work, and thereby contributed to the arrangement, the employer cannot rely on the fact the agreement was otherwise unlawful to defend itself from an application for certification – The status of the individuals was resolved in favour of inclusion in the bargaining unit – Matter continues

HVM HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Jan./Feb.) 43

Certification – Construction Industry – Status – The Board held that three employees performing grading work on gravel roads and surfaces were engaged in maintenance and not repair, and therefore they were excluded from the construction bargaining unit the applicant was seeking – The maintenance work involved fixing potholes and leveling the surfaces on roads, driveways and in a parking lot – No new material was added or taken away, and the surfaces were at all times functional before, during and after the work was performed – Matter continues

ELLWOOD ROBINSON LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Mar./Apr.) 197

Certification – Construction Industry – Status – Trade Union – The Labourers challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – The Board held that a previous decision granting CCWU status as a trade union in the construction industry, *PBS Construction*, was not binding on the Labourers because they had been denied status to participate in that proceeding – The CCWU's purported collective agreements with three employers in the construction industry were found not to be valid by the Board because the employer signatories to the impugned agreements were not employers under the Act, or (in one instance) because of employer support in the formation or administration of the trade union – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – Applications dismissed

EMPIRE CONTINENTAL MANAGEMENT C.O.B. EMPIRE COMMUNITIES AND/OR EMPIRE HOMES; RE CANADIAN CONSTRUCTION WORKERS UNION; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 21

Certification – Construction Industry – The OPDC (LIUNA) challenged the timing of CLAC's application on two grounds: (1) there were two earlier applications for certification filed by LIUNA in which there is some overlap in bargaining unit with the present application; and (2) the present application is barred because it relates to the same bargaining unit that was dismissed pursuant to s. 128.1(14)(e) in one of the two earlier applications – The Board allowed the instant application to proceed because the description of the bargaining unit in the earlier "live" application has not yet been

determined – Furthermore, the Board found s. 128.1(15) to be analogous to s. 10(3) of the Act in that reference is made to individual employees in the bargaining unit, and not positions in the unit, so a unit with an entirely new complement of employees cannot be barred from proceeding – Matter continues

LOOBY CONSTRUCTION LIMITED; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 815

Certification – Construction Industry – The OPDC applied to certify employees of the responding party working on three projects in Board Area 4; the membership evidence was filed on behalf of Local 1081 – The responding party asserted that Local 1059 holds bargaining rights for labourers employed by the responding party in Board Area 3 by virtue of a voluntary recognition agreement, and any of its employees working outside the scope of the Board Area are bound by that agreement – The Board held that, absent a written agreement, it cannot find that a VRA exists – The Board further held that the gratuitous application of terms of a collective agreement does not bind the parties to that agreement – Finally, the Board found that since both Local 1059 and Local 1081 are constituent members of the applicant, the manner in which the applicant collected membership evidence from the employees was irrelevant to the disposition of the application since the employees were already members of the applicant – Certificate issued

PACHECOS CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 820

Certification – Construction Industry – The union sought to withdraw its challenges to the employer's list following a representation vote and requested, in addition, that the Board dismiss the application without a bar, pursuant to the employer's s. 8.1 notice, because the union acknowledged that it had less than 40% support of the individuals in the bargaining unit – The union, however, had already agreed to a bargaining unit that had the support of 41% of the employees in it – The Board held that the union could not invoke s. 8.1 of the Act after it had agreed the number of employees in the bargaining unit was more than 40%, and after a representation vote had been held – The Board determined that the application must be dismissed either under 10(2) or 7(10) of the Act

EXCEL STEEL LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 540.....(Nov./Dec.) 778

Certification – Employee – Status – The parties could not agree on whether certain employees were full-time or part-time – The employees in dispute ("Casual Maintenance Workers/ Operators – On Call") were paid for a minimum of twenty-five hours per week and were required to hold themselves available to the employer for those hours, albeit not at the workplace – The employer argued that these were part-time employees, relying on the Board's jurisprudence ("regularly employed for not more than twenty-fours hours" in four of the last seven weeks leading up to the application for certification) and asserting that the Board should consider "hours worked" as opposed to "hours paid" – The Board held that the disputed employees were required to demonstrate a full-time commitment to the employer and therefore should be included in the full-time bargaining unit – Count ordered

TWD ROADS MANAGEMENT INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....(Jul./Aug.)

Certification – Judicial Review – Representation Vote – Stay – A request for a stay of a Board decision ordering a vote count was dismissed in March 2008, with reasons to follow – The Court held that the first part of the test for a stay requires that the applicant establish there is a strong *prima facie* case that the Board's decision is unreasonable, rather than that there was a serious issue to be tried – The applicant failed to pass this test, as well as the other criteria (irreparable harm; balance of convenience) – Stay application dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.....(Jul./Aug.) 599

Certification – Judicial Review – Representation Vote – Stay – The employer sought a stay of the Board's decisions ordering a vote and a ballot count – Request for stay dismissed – Reasons to follow

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OLRB AND OPSEU.....(Mar./Apr.) 306

Certification – Judicial Review – Representation Vote – The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.....(Nov./Dec.) 865

Certification – Practice and Procedure – Representation Vote – The bargaining unit proposed by the union in its application for certification lacked any geographic scope clause – A majority of the Board found that s. 8(2) directs that a representation vote be taken where there is an appearance of 40% membership in the bargaining unit proposed by the union – A majority of the Board determined that a representation vote must occur and that the ballot box would be sealed – The appropriateness of the bargaining unit would be dealt with as part of the s. 8.1 notice – Vote ordered

WESTERN TORONTO INTERNATIONAL TRUCKS INC.; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS .....(Sept./Oct.) 739

Certification Where Act Contravened – Certification – Construction Industry – Remedies – Unfair Labour Practice – The applicant chose to conduct its organizing drive through salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

LECOMPTE ELECTRIC INC.; RE IBEW, LOCAL 586; RE CLAYTON BLOOM ..... (Mar./Apr.) 234

Certification where Act Contravened – Construction Industry – Remedies – Unfair Labour Practice – The union sought remedial certification claiming the employer had dismissed two union organizers – The dismissals occurred the day immediately before the application for certification was filed – The employer subsequently acknowledged breach of the Act through a letter to all employees and the offer of re-employment to the terminated organizers – The union failed to assert that other employees knew about the unfair labour practice activity prior to the application for certification being filed – The union failed to establish that its inability to demonstrate that forty percent or more of the employees in the bargaining unit appeared to be members of the applicant, at the time the application was filed, was as a result of the Employer's unfair labour practice – The Board refused to order remedial certification where the union failed to take any steps to obtain further membership support after unfair labour practice activity – Remedial certification will only be considered where the union is initially able to demonstrate a causal relationship between the Employer's unfair labour practice activity and the union's inability to achieve support at the time the application was filed – Application for Certification dismissed – Unfair Labour Practice settled

K.D. CLAIR CONSTRUCTION LTD., K.D. CLAIR WESTERN INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA ..... (Jan./Feb.) 60

Certification Where Act Contravened – Construction Industry – Remedy – Unfair Labour Practice – The union sought remedial certification because of the employer's alleged breaches of the Act – It held captive audience meetings with employees, questioned who had signed union cards, threatened job security, and violated the freeze provisions of the Act by unilaterally giving unprecedented across the board wage increases to employees at the start of the construction season – The Board found that the employer used its standard morning meetings to express views in opposition to the union, and in particular made more than veiled threats to the employees in the captive meetings – Further, the employer implemented wage increases without consultation or input from the union, and contrary to its historical practice – The Board held that no remedy short of remedial certification would sufficiently counter the effects of the employer's conduct – Certificate issued

CARLOS BARBOSA CONCRETE LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 (May/June) 334

Conflict of Interest – Construction Industry – Practice and Procedure – Related Employer – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected

to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008).....(Nov./Dec.) 785

Conflict of Interest – Practice and Procedure – The Board noted that there has been an increase in the frequency of motions to remove counsel of record from particular applications due to alleged conflicts of interest – The Board held that such allegations are serious challenges to a lawyer's professionalism and should not be treated casually – Assuming a role analogous to the Superior Court in similar circumstances, the Board in the instant case issued a direction and schedule for the exchange and delivery of declarations as to the facts (and supporting documents) on which the parties rely in the motion – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC.; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (November 5, 2008).....(Nov./Dec.) 781

Consent to Prosecute – *Crown Employees Collective Bargaining Act* – Interim Relief – Sale of Business – Successor Rights – Unfair Labour Practice – AMAPCEO, representing Crown employees working in the Office of Child and Family Service Advocacy, whose duties and responsibilities were being transferred to the Provincial Advocate for Children and Youth (PACY) pursuant to the *Provincial Advocate for Children and Youth Act, 2007*, applied for a declaration of successor rights under s. 10 of *CECBA* – The Board found there was a transfer of an undertaking: all the components of the predecessor OCFSA were conferred to the successor PACY; all former clients of OCFSA continued as clients of PACY; the same management, supervising and directing the same work force in the same place also continued – The only change was that the employees were no longer Crown employees, but reported to the Legislature – The Board found that PACY failed to meet the onus of establishing that the Legislative privilege it alleged existed was closely and directly connected with the fulfillment of the duties and responsibilities of the Legislature – Board declared PACY to be successor employer; Consent to Prosecute withdrawn, other applications adjourned

THE CROWN IN RIGHT OF ONTARIO AND PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH; RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO .....(Sept./Oct.) 622

Constitutional Law – Bargaining Rights – Construction Industry – Employer – Termination – The Independent Electricity Market Operator, currently called the Independent Electricity System Operator (IESO), sought a declaration that it was a non-construction employer because it was a consumer of construction services and not a vendor of same – If such a declaration were to issue from the Board, the unions reserved the right to challenge the constitutionality of the non-construction employer provisions – The IESO has two main functions: (1) to ensure the reliable operation of the electrical power system in Ontario; and (2) to operate the wholesale electricity market in Ontario (including a price-setting

function) – The IESO is neither a generator nor a transmitter of electricity; it ensures the reliability of the electrical power system in the province through market rules and operating agreements with various market participants – There was no dispute that the IESO engages contractors from time to time to perform construction work for its own benefit – The Board found that market fees paid to the IESO by market participants are not the kind of compensation contemplated by the definition of a non-construction employer – The Board found the situation in the present case to be similar to government funding provided to a school board that the board uses to pay for construction activity: the funds are not paid in order for construction work to be performed for the benefit of the giver of the funds – Non-construction employer declaration granted – Matter referred to Registrar to schedule constitutional argument

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE LIUNA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059 ..... (Mar./Apr.) 210

Constitutional Law – Bargaining Rights – Termination – An employee in the construction industry applied for termination of bargaining rights – The union argued that on the application date, the applicant's work was within federal jurisdiction – The applicant was installing sensors to monitor temperature and humidity in computerized offices used by a federal intelligence/security agency, a core federal undertaking – The removal of labour relations from provincial competence is exceptional, and is only appropriate when the subsidiary's work is integral to a core federal undertaking – The Board held that the sensor system was not integral to the core federal undertaking – The construction employer did no work that was directly or indirectly related to the agency's federal purposes in intelligence and security – Therefore, the employer's labour relations were governed by the *Labour Relations Act* and by the Board – Matter continues

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; RE THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 ..... (Jul./Aug.) 563

Constitutional Law – Employment Standards – The applicant sought review of an employment standards officer's refusal to issue an order to pay in circumstances where she alleged she was deprived of her position following a pregnancy leave – The Board first determined that the employer, a logistics company that coordinated international and interprovincial transportation of goods, was a provincial undertaking and subject to Ontario laws – On the substantive issue, the Board held that the legislation requires an employee returning from pregnancy leave to be returned to her original position (or if it no longer exists a comparable one), but not necessarily to all the duties and responsibilities that position entailed – The transfer of certain client accounts to other employees was not a penalty under the Act – Application dismissed

PINNACLE FREIGHT SPECIALISTS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ARDELLE D. STONER ..... (Jul./Aug.) 555

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197. MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS

UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO ..... (Mar./Apr.) 314

Construction Industry – Alteration of Jurisdiction – Practice and Procedure – Trade Union – After the parent trade union (UBC) assumed supervision over the Local, the Local brought an application to the Board under s. 147 and 149 – Two matters were at issue: the Local's refusal to provide data in a digital format to UBC (ULTRA issue) and the fact that persons were permitted by the Local to work in its area without becoming, or being permitted to become, members of the Local ("permit workers" issue) – The Board noted the underlying tension between UBC and the Local since UBC had reduced the number of locals and required them to join together into two regional councils – Although the parties settled the Ultra issue, the Board noted that the lack of forthrightness on the part of the Local and the lengthy delay in putting forward any sort of explanation was inappropriate – The Board found that the Local failed in its obligation to provide full disclosure to UBC of an issue in which it had a legitimate interest and a right to be informed – Such a refusal gave UBC just cause to restrict the autonomy of the Local by way of supervision but not to the extent of the one that was imposed – The Board made a more limited order addressing the production of information about permit workers from the Local to UBC – Declaration made

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL UNION 1256; RE ARNOLD BONGERS ET AL, AS THE TRUSTEES OF THE CARPENTERS' LOCAL 1256 PENSION PLAN, THE CARPENTERS' LOCAL 1256 VACATION PAY PLAN AND THE CARPENTERS' LOCAL 1256 WELFARE PLAN ..... (Sept./Oct.) 715

Construction Industry – Bargaining Rights – Constitutional Law – Employer – Termination – The Independent Electricity Market Operator, currently called the Independent Electricity System Operator (IESO), sought a declaration that it was a non-construction employer because it was a consumer of construction services and not a vendor of same – If such a declaration were to issue from the Board, the unions reserved the right to challenge the constitutionality of the non-construction employer provisions – The IESO has two main functions: (1) to ensure the reliable operation of the electrical power system in Ontario; and (2) to operate the wholesale electricity market in Ontario (including a price-setting function) – The IESO is neither a generator nor a transmitter of electricity; it ensures the reliability of the electrical power system in the province through market rules and operating agreements with various market participants – There was no dispute that the IESO engages contractors from time to time to perform construction work for its own benefit – The Board found that market fees paid to the IESO by market participants are not the kind of compensation contemplated by the definition of a non-construction employer – The Board found the situation in the present case to be similar to government funding provided to a school board that the board uses to pay for construction activity: the funds are not paid in order for construction work to be performed for the benefit of the giver of the funds – Non-construction employer declaration granted – Matter referred to Registrar to schedule constitutional argument

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE LIUNA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059 ..... (Mar./Apr.) 210

Construction Industry – Bargaining Unit – Certification – Practice and Procedure – Status – Unfair Labour Practice – The Board issued a number of preliminary and procedural

rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees provided by the responding party at the regional certification meeting because of the prejudice the applicants would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

CLEAN WATER WORKS INC.; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Mar./Apr.) 171

Construction Industry – Bargaining Unit – Certification – Reconsideration – Two unions sought certification for the same employees in non-ICI units in two adjacent Board Areas (9 and 11) – The employer agreed with the bargaining units proposed for Board Area 11, and provided identical Schedule "A" lists in response to each application; however, the employer disagreed that the scope of any bargaining unit should encompass Board Area 9 and asserted that it had no employees working in that Area on the application date – In an earlier decision, the Board (differently constituted) concluded that it had no option but to issue a certificate to each applicant for Board Area 11 – In a continuation of the proceeding, the parties argued about whether it was necessary for each applicant to establish that at least one employee performed work of its trade in Board Area 9 for a majority of his or her working day and what effect this would have on the earlier certificates – The employer argued the Board should reconsider its earlier decision so it could ascertain the "majority of the day" issue – The applicants asserted that the responding party cannot resile from its original position, and the Board should find that someone worked in each Area on the application date, and should either issue two new certificates relating to Board Area 9 or revoke the earlier certificates and issue fresh ones for the broader geographic scope – The Board held that it has never required an applicant applying for a bargaining unit encompassing more than one Board Area to pass a "majority of the day" threshold with respect to more than work in a particular trade – The *Gilvesy* focus is on *what work* was performed, not *where* – The appropriate approach for the Board would be to reconsider the earlier certificates, revoke them and re-issue new certificates reflecting the expanded geographic scope – This should not be an opportunity for the responding party to renege on an earlier position – Hearing directed to ascertain if applicants had any employees performing work in Board Area 9 on the application filing date

BONNECHERE EXCAVATING INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 (May/June) 326

Construction Industry – Bargaining unit – Certification – Settlement – The union applied for a bargaining unit outside the ICI sector that included carpenters and labourers, trades which, to the union's knowledge, were the only unrepresented trades working on the date of application – The Employer's response accepted the Union's proposed bargaining unit and the Board determined the bargaining unit that was appropriate for collective bargaining on that basis – At the Regional Certification Meeting the parties confirmed their agreement with respect to the bargaining unit description and when post-RCM submissions were made, the Employer's challenge to the status of one individual was that he spent the majority of his day doing operating engineer's work – The Board noted, in determining whether to amend the bargaining unit, it must reconcile two completing principles: 1) that parties should be bound to the agreements they make; and 2) that

outside the ICI sector, construction trade unions must seek bargaining rights within a Board area either for their own craft or for all unrepresented trades at work on the date of application – The Board found that the first principle must yield to the second for the following reasons: first, the labour relations consequences of abrogating the second principle would create too many jurisdictional disputes; second, the individual in question would be in a position where the individual would be highly unlikely to be represented by a bargaining agent; third, the second principle avoids conflicts over bargaining unit descriptions by maintaining a bright line approach (if a craft union applies for more than their trade, they must take all unrepresented trades) – Finally, the Board concluded that a standard bargaining unit for the non-ICI sectors of the construction industry serves to avoid manoevering, gerrymandering, positioning and tactical manipulation in the certification process – Bargaining unit description amended – Matter continues

RAYMAC CUSTOM HOMES AND/OR RAYMAC CORPORATION; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 686

Construction Industry – Bargaining Unit – Local 183 applied under s. 158(2) [non-ICI] for a bargaining unit of all construction labourers working in Board Areas 9 and 18 – On the application filing date there were two employees working – one in each Area – The responding party argued that the appropriate bargaining unit under section 158(2) must be a single geographic Board Area, and since there was only one employee in each area, the application must be dismissed pursuant to s. 9(1) – The Board found that the reference to a geographic area in s. 158(2) provides for minimal coverage encompassed in a certificate and does not foreclose the Board from making a determination that a bargaining unit description that goes beyond one geographic area is appropriate – This view is consistent with the requirement under s. 160 to issue one certificate in the ICI and another in relation to all other sectors in the appropriate geographic area or areas – Application proceeds

HAVENWOOD HOMES; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Mar./Apr.) 201

Construction Industry – Certification – Sector Determination – The first issue to be decided in this application for certification was whether the project (the construction of Goreway Station – a combined cycle gas-powered generation station) was in the ICI or electrical power systems sector – After reviewing the historical background and case law dealing with the boundaries of the electrical power systems sector, the Board addressed the factors for determining a sector dispute – The Board found that the bargaining patterns pointed strongly to the ICI sector; that work characteristics also indicated that the work fell within the ICI; and finally that end use pointed to the electrical power systems sector (although not as strongly) – The Board concluded that the bulk of the project fell in the ICI, and accordingly the application was untimely – Application dismissed

BARCLAY CONSTRUCTION GROUP INC.; RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE IUOE, LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE SNC-LAVALIN POWER ONTARIO INC.; RE IBEW, CONSTRUCTION COUNCIL OF ONTARIO; IBEW, LOCAL 353; RE GOREWAY STATION PARTNERSHIP ..... (Mar./Apr.) 136

Construction Industry – Certification – Certification Where Act Contravened – Remedies – Unfair Labour Practice – The applicant chose to conduct its organizing drive through

salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

LECOMPTE ELECTRIC INC.; RE IBEW, LOCAL 586; RE CLAYTON BLOOM ..... (Mar./Apr.) 234

Construction Industry – Certification – Dependent Contractor – Status – In this application for certification, the Applicant alleged that three individuals, McGowan, Page and Baker were all dependent contractors and therefore employees of Salzburg – The individuals conducted 90 to 100% of their work for Salzburg – McGowan and Page both provided work to Salzburg through business entities and were free to accept and refuse any projects, however, they rarely refused projects from Salzburg – There was very little supervision – The Board found that McGowan was a dependant contractor for the purposes of the *Labour Relations Act* – He was in a position of economic dependence upon Salzburg – Their relationship exhibited the same hallmarks as that of an hourly employee – Conversely, the Board found that Page and Baker were not employees of Salzburg – The evidence clearly showed that Page was the employer of Baker – All direction was provided by Page and not Salzburg – Page was an independent contractor, who had entered into a voluntary agreement with the Applicant and therefore was bound by a collective agreement – Matter continues

SALZBURG INTERIORS & FURNITURE LTD.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA ..... (Jan./Feb.) 96

Construction Industry – Certification – Employer – The Labourers sought certification of a unit of employees the union alleged were employed by one of the Monarch companies – Both Monarch and the intervenor challenged the application, arguing that the real employer was the intervenor, a personnel placement agency – The Board found that the employees were hired by the intervenor and assigned to Monarch; Monarch had no employees of its own working at its sites; disciplinary issues were handled by the intervenor; the intervenor re-assigned employees when they were no longer needed at Monarch; the intervenor bore responsibility for remuneration, paying the employer share of benefits, wages and bonuses – The Board was satisfied that fundamental control over the employees rested with the intervenor – Application dismissed

MONARCH CORPORATION AND MONARCH DEVELOPMENT CORPORATION; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE THE K.A.S. GROUP OF COMPANIES ..... (Jan./Feb.) 76

Construction Industry – Certification – Employer Support – Unfair Labour Practice –The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to

unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

PRE-ENG CONTRACTING LTD.; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, LOCAL 506; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNTED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (Mar./Apr.) 284

Construction Industry – Certification – Evidence – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ..... (Nov./Dec.) 803

Construction Industry – Certification – Judicial Review – Mootness – Practice and Procedure – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted ([2007] OLRB Rep. Mar/Apr 459) – Subsequent to the Divisional Court determining the Board had discretion to consider late-filed information pursuant to s. 128.1(3)), the Board reconsidered and revoked the certificate issued to the union and set the matter down for a Regional Certification meeting as it was unable to determine the number of employees in the bargaining unit – The Court of Appeal found these post-judicial review events rendered the matter before it moot, because the underlying controversy (whether the Board can consider and act on the information) had already been acted upon by the Board – The Court also decided not to exercise its discretion to decide the moot appeal on the merits

because a) an adversarial context still existed; and b) while the issues (standard of review and interpretation of the s. 128.1) are important, they do not raise questions of broad social and constitutional importance, and they are not evasive of review – Finally the court cautioned that the decision was not an affirmation of Divisional Court's finding that the appropriate standard of review was correctness – The court made it clear that deference was owed to the Board on these types of issues – Appeal dismissed

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819 AND OLRB ..... (Mar./Apr.) 306

Construction Industry – Certification – Judicial Review – Reconsideration – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB ..... (Nov./Dec.) 859

Construction Industry – Certification – Judicial Review – Status – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB ..... (Nov./Dec.) 858

Construction Industry – Certification – Practice and Procedure – Timeliness – The IUOE asked the Board to refuse to consider the response to its application for certification since the respondent had failed to file within the time limits set out by the Act and the Board's Rules of Procedure – The applicant had contemporaneously filed an industrial application and a construction application for certification – The Board reviewed its jurisprudence on the exercise of its discretion – In the instant case, the Board held that the respondent's error in believing there to be only one application for certification was reasonable in the

circumstances – The Board found that the IOUE contributed to the respondent's confusion by simultaneously delivering multiple applications, each with a cover letter on the same letterhead with the same solicitor's file number on it – The Board held that applicant could have alerted the respondent to fact that there were two applications – The Board exercised its discretion and considered the information contained in the late-filed response – Matter continues

CARMAN CONSTRUCTION INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 .....(Jan./Feb.) 1

Construction Industry – Certification – Practice and Procedure – The Sheet Metal Workers International Association (SMWIA) sought to displace the Carpenters performing roofing or siding work in the low rise portion of the residential sector – The Carpenters argued that the applications should be dismissed because the SMWIA Constitution prohibited persons compensated on a lump sum or piecework basis from being members of that union – The Board found that SMWIA had adopted the Carpenters' existing terms and conditions for residential roofers and siders, such that the workers fit into the exemption for pieceworkers and were not prohibited from membership – The responding parties argued that the individuals the SMWIA sought to represent were employers themselves, and not employees – The Board found that the nature of the relationship between pieceworkers and their helpers, on the one hand, and the responding parties, on the other, had evolved over time so the companies' argument that they had no employees could not be sustained – The Board also held that it was impossible, at this stage in the proceedings, to determine whether an individual working as a pieceworker or helper on a company's job site was employed by that company or by some other employer (or perhaps was an employer himself) – Finally, the Board refused to vary the *Gilvesy* test for voter eligibility in certification applications in the construction industry, given that the decisions ordering votes had clearly identified those eligible as "individuals who were employed by Eastern Eavestroughing" on a specific date – Since there was a potential for more than six hundred status disputes in these applications, the Board issued directions for the filing of book-in sheets and other documentary evidence which would assist in indicating who may have been at work on the date of application – Matters continue

EASTERN EAVESTROUGHING LTD.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA.....(May/June) 368

Construction Industry – Certification – Practice and Procedure – Remedial Certification – The union filed an application for certification with less than 40% membership and applied for remedial certification under s. 11 – In its application the applicant failed to identify which certification regime (s. 8 or 128.1) it was choosing – The responding party argued this was fatal – The Board found, based on statements made elsewhere in the application that the applicant had elected to proceed under s. 8 – Additionally, the Board noted that s. 128.1 specifically requires an election and since the applicant had not elected s. 128.1, the application must be dealt with under s. 8 – Matter continues

ASHBRIDGE ELECTRIC CONTRACTORS LIMITED; RE IBEW, LOCAL 353 .....(Jul./Aug.) 489

Construction Industry – Certification – Practice and Procedure – Representation Vote – Status – In light of a s. 8.1 challenge as well as status disputes in two certification applications filed by different unions involving the same employer, the Board ordered that the ballots

cast in the representation vote be segregated and the ballot box sealed – Unfortunately, the ballots were not segregated – The Board ordered a second representation vote but ruled that only those individuals who cast ballots in the first vote should be eligible to cast ballots in the second vote – Second vote ordered; submissions directed

CLEAN WATER WORKS INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Sept./Oct.) 617

Construction Industry – Certification – Practice and Procedure – The Board considers whether it can and should accept a late-filed response to an application for certification – Corporate counsel for the responding party wrote to the Board on the due date, asking for an extension so that a labour lawyer could be consulted; the response was filed one day late – The Board analyzes the impact of the Court of Appeal's decision in *Maystar* [2008] OLRB Rep. March/April 306 and holds that because of the concluding paragraphs of that decision, the Divisional Court's ruling on the interpretation of s. 128.1(3) is not binding on the Board – The Board holds, however, that the Divisional Court's interpretation of the impugned section is persuasive: the word "shall" in s. 128.1(3) is directed at the employer, not the Board, and it should be interpreted in a directory and not a mandatory manner – A mandatory approach would lead to unfair results, and would require the Board to treat the various aspects of a late-filed response differently – Accordingly, the Board finds it does have the discretion to consider late-filed information under s. 128.1(3) – In exercising its discretion to accept the delayed response, the Board considers the length of the delay; how compelling the responding party's explanation of its delay is; and the prejudice to the applicant – The Board allows the late-filed response and refers the matter to a regional certification meeting

CHRISTINA HOMES LTD. AND/OR 1357202 ONTARIO LTD. AND/OR CHRISTINA WEST JOINT VENTURE; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Nov./Dec.) 749

Construction Industry – Certification – Practice and Procedure – The applicant, applying for certification with membership cards for Local 249, mistakenly named the Carpenters' Union, Central Ontario Regional Council (in which Local 249 is not a constituent member), instead of the Carpenters District Council of Ontario, as applicant – The Board, relying on s. 112, permitted the applicant to amend its name because: the change was not a substantive one; it was a *bona fide* mistake which created no advantage for the applicant nor any prejudice to the respondent; and the mistake did not affect the integrity of the membership evidence – Motion to amend allowed, matter continues

JENSEN BUILDING LTD.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO; UBCJA ..... (Nov./Dec.) 812

Construction Industry – Certification – Practice and Procedure – The Board provides reasons for the acceptance a late-filed response to an application for certification – The applicant filed two very similar applications for certification with the responding party in close proximity; the responding party asserted that it did not receive the first application, and thought the hard copy material it received was a re-sending of the first application, when in fact it was a second application; nothing on the face of the new material identified for the responding party that this was a fresh application – The Board surveys its own case law, beginning with *Air Kool*, gives consideration to the court decisions in *Maystar*, and surveys other court rulings on the interpretation of "shall" – The Board concludes it is not bound by the Divisional Court's decision in *Maystar* because the Court of Appeal explicitly invited the Board to reconcile its jurisprudence – In considering whether it has

the discretion to accept a late-filed response, the Board finds that an interpretation of the word 'shall' as directory in nature: (1) is consistent with and best ensures the attainment of the purposes of the Act; (2) eliminates the unintended consequences that result from concluding that the word is mandatory; (3) is consistent with establishing a common meaning for both the English and French texts of the Act; and (4) is consistent with the principles of natural justice – The Board finds that the responding party committed an innocent error in not recognizing that the applicant had filed two applications for certification, and the responding party acted promptly in rectifying the error once it learned of the true situation – Late response allowed

WEATHERTECH RESTORATION SERVICES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 832

Construction Industry – Certification – Reconsideration – The union sought reconsideration of an earlier Board decision allowing the late filing of a response to one of two applications for certification delivered to the employer on the same day – The Board confirmed that the responding party had a legitimate reason to substantiate the late filing of its response when union counsel's cover letters to the two applications for certification were remarkably similar and the courier packaging of the two applications was virtually identical – The Board further held that the delay caused by the late filing was only two days, and not eleven days as asserted by the applicant: the union could have acted on the late filing as soon as it was received--late on a Friday afternoon of a long weekend--rather than waiting until the following Tuesday – Finally, the Board confirmed that it was not ascribing any responsibility to the applicant for the employer's confusion although it did indicate that had the union been clearer about its delivery of the two application packages, such clarity would have gone a long way to undermining the legitimacy of the employer's excuse for its confusion – Reconsideration request denied

CARMAN CONSTRUCTION INC. ; RE IUOE, LOCAL 793.....(Mar./Apr.) 160

Construction Industry – Certification – Status – The Board examined whether five individuals were employees of the responding party on the date of the application for certification, and whether they were properly included in the bargaining unit – During the Labourers' province-wide strike in the ICI sector in June of 2007, five union members were sent to work for the non-union responding party – The work done had previously been sub-contracted to a company who was bound to the provincial ICI agreement and therefore was unable to maintain the contract due to the strike – The work was subsequently done by carpenters after the five labourers, whose status was to be decided in this proceeding, were no longer required – The Board held that two unions doing the same work on different days did not act as a bar to certification so long as both unions' members were performing work falling within their jurisdiction – An application for certification is not the appropriate time to deal with work jurisdiction disputes – The Board found that the five individuals were under the direction of the responding party's representative and were doing work as its employees – The responding party asserted that (1) the employees were unlawfully working on the date of the application because they were members of the union who were on a province-wide ICI strike; (2) the referral by the union of striking workers constituted an unlawful arrangement under section 162(2) of the Act and, having referred the workers, the union cannot rely on its own misconduct as the basis for a certification application – The Board held that the impugned actions do not frustrate the purpose of section 162(2): the prevention of agreements between a union and a union contractor to keep working through a lawful strike – In the circumstance where the non-union employer sought the referral from the union, voluntarily accepted the employees, acquired the benefit of the work, and thereby contributed to the arrangement,

the employer cannot rely on the fact the agreement was otherwise unlawful to defend itself from an application for certification – The status of the individuals was resolved in favour of inclusion in the bargaining unit – Matter continues

HVM HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Jan./Feb.) 43

Construction Industry – Certification – Status – The Board held that three employees performing grading work on gravel roads and surfaces were engaged in maintenance and not repair, and therefore they were excluded from the construction bargaining unit the applicant was seeking – The maintenance work involved fixing potholes and leveling the surfaces on roads, driveways and in a parking lot – No new material was added or taken away, and the surfaces were at all times functional before, during and after the work was performed – Matter continues

ELLWOOD ROBINSON LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Mar./Apr.) 197

Construction Industry – Certification – Status – Trade Union – The Labourers challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – The Board held that a previous decision granting CCWU status as a trade union in the construction industry, *PBS Construction*, was not binding on the Labourers because they had been denied status to participate in that proceeding – The CCWU's purported collective agreements with three employers in the construction industry were found not to be valid by the Board because the employer signatories to the impugned agreements were not employers under the Act, or (in one instance) because of employer support in the formation or administration of the trade union – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – Applications dismissed

EMPIRE CONTINENTAL MANAGEMENT C.O.B. EMPIRE COMMUNITIES AND/OR EMPIRE HOMES; RE CANADIAN CONSTRUCTION WORKERS UNION; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 21

Construction Industry – Certification – The OPDC (LIUNA) challenged the timing of CLAC's application on two grounds: (1) there were two earlier applications for certification filed by LIUNA in which there is some overlap in bargaining unit with the present application; and (2) the present application is barred because it relates to the same bargaining unit that was dismissed pursuant to s. 128.1(14)(e) in one of the two earlier applications – The Board allowed the instant application to proceed because the description of the bargaining unit in the earlier "live" application has not yet been determined – Furthermore, the Board found s. 128.1(15) to be analogous to s. 10(3) of the Act in that reference is made to individual employees in the bargaining unit, and not positions in the unit, so a unit with an entirely new complement of employees cannot be barred from proceeding – Matter continues

LOOBY CONSTRUCTION LIMITED; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 815

Construction Industry – Certification – The OPDC applied to certify employees of the responding party working on three projects in Board Area 4; the membership evidence was filed on behalf of Local 1081 – The responding party asserted that Local 1059 holds bargaining rights for labourers employed by the responding party in Board Area 3 by virtue of a voluntary recognition agreement, and any of its employees working outside the scope of the Board Area are bound by that agreement – The Board held that, absent a written agreement, it cannot find that a VRA exists – The Board further held that the gratuitous application of terms of a collective agreement does not bind the parties to that agreement – Finally, the Board found that since both Local 1059 and Local 1081 are constituent members of the applicant, the manner in which the applicant collected membership evidence from the employees was irrelevant to the disposition of the application since the employees were already members of the applicant – Certificate issued

PACHECOS CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 820

Construction Industry – Certification – The union sought to withdraw its challenges to the employer's list following a representation vote and requested, in addition, that the Board dismiss the application without a bar, pursuant to the employer's s. 8.1 notice, because the union acknowledged that it had less than 40% support of the individuals in the bargaining unit – The union, however, had already agreed to a bargaining unit that had the support of 41% of the employees in it – The Board held that the union could not invoke s. 8.1 of the Act after it had agreed the number of employees in the bargaining unit was more than 40%, and after a representation vote had been held – The Board determined that the application must be dismissed either under 10(2) or 7(10) of the Act

EXCEL STEEL LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 540.....(Nov./Dec.) 778

Construction Industry – Certification where Act Contravened – Remedies – Unfair Labour Practice – The union sought remedial certification claiming the employer had dismissed two union organizers – The dismissals occurred the day immediately before the application for certification was filed – The employer subsequently acknowledged breach of the Act through a letter to all employees and the offer of re-employment to the terminated organizers – The union failed to assert that other employees knew about the unfair labour practice activity prior to the application for certification being filed – The union failed to establish that its inability to demonstrate that forty percent or more of the employees in the bargaining unit appeared to be members of the applicant, at the time the application was filed, was as a result of the Employer's unfair labour practice – The Board refused to order remedial certification where the union failed to take any steps to obtain further membership support after unfair labour practice activity – Remedial certification will only be considered where the union is initially able to demonstrate a causal relationship between the Employer's unfair labour practice activity and the union's inability to achieve support at the time the application was filed – Application for Certification dismissed – Unfair Labour Practice settled

K.D. CLAIR CONSTRUCTION LTD., K.D. CLAIR WESTERN INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA .....(Jan./Feb.) 60

Construction Industry – Certification Where Act Contravened – Remedy – Unfair Labour Practice – The union sought remedial certification because of the employer's alleged

breaches of the Act – It held captive audience meetings with employees, questioned who had signed union cards, threatened job security, and violated the freeze provisions of the Act by unilaterally giving unprecedented across the board wage increases to employees at the start of the construction season – The Board found that the employer used its standard morning meetings to express views in opposition to the union, and in particular made more than veiled threats to the employees in the captive meetings – Further, the employer implemented wage increases without consultation or input from the union, and contrary to its historical practice – The Board held that no remedy short of remedial certification would sufficiently counter the effects of the employer's conduct – Certificate issued

CARLOS BARBOSA CONCRETE LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 .....(May/June) 334

Construction Industry – Conflict of Interest – Practice and Procedure – Related Employer – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008).....(Nov./Dec.) 785

Construction Industry – Evidence – Practice and Procedure – Related Employer – Sale of Business – Union sought to have admitted thirty year old documents as "business records," specifically a letter commenting on the binding nature of a collective agreement – The employer objected arguing that it was caught in an impossible position as it must find the author or another witness to give evidence about documents that apparently created some 30 years ago have played no role in the corporation's existence since that time – The Board found the records were not admissible pursuant to s. 35(2) of the *Evidence Act*, in that the record did not meet any of the conditions set out in the subsection – The Board also found that even if s. 111(2)(c) of the *LRA, 1995* created a wider scope than s. 35, it would not admit the record because the documents are expressions of opinion by parties whose source of information and belief cannot be ascertained, and therefore no weight could be placed on them – Additionally, the Board applied the rule in *Browne v. Dunn* and did not admit evidence that contradicted earlier testimony by a witness where the contradiction was not put to the witness during cross examination – Matter continues

CADILLAC FAIRVIEW COROPORATION LTD., THE, CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS INC. AND REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795 .....(Jul./Aug.) 491

Construction Industry – Interim Relief – Jurisdictional Dispute – Practice and Procedure – Strike – Local 793 sought an interim order that would return "flagman" work from Local 506 to its members pending the resolution of the main application – Ellis-Don, which is bound by collective agreements to Local 506, subcontracted work to Metric, which is bound by collective agreements to Local 793, but not Local 506 – Metric assigned the "flagman" work to Local 793 – Local 506 was effective in lobbying Ellis Don to change the work assignment and give it to 506 – The Board found no basis for issuing an interim order simply because the general contractor responsible for the project decided to change the work assignment after one of the unions adversely affected by the initial assignment was effective in lobbying – On the declarations filed the Board did not find any direct evidence of a threat to engage in a strike, cause a strike or otherwise disrupt the work at the project – Absent the above evidence, and given an explicit and credible denial of any threat having been made, the Board found that an interim order would be inappropriate – Application dismissed; matter continues

METRIC CONTRACTING SERVICES CORPORATION; RE IUOE, LOCAL 793; RE LIUNA, LOCAL 506, ELLIS-DON CONSTRUCTION LTD.....(May/June) 428

Construction Industry – Parties – Termination – Timeliness – The applicant sought to terminate the bargaining rights of LIUNA Local 607 – There was no dispute that the bargaining rights were held by LIUNA, Ontario Provincial District Council – The Board found that the OPDC must have been certified on the basis of the employees' membership in Local 607, since employees can only be members of locals, and not of the council – Local 607 conducted bargaining, drafted collective agreements, and made the application for the appointment of the conciliator – The Board held that given that the OPDC and Local 607 could agree on the transfer of bargaining rights, and given such a widespread practice once a certificate had been issued, it was not unreasonable for the applicant to assume that Local 607 was his bargaining agent – The style of cause was amended to include both Local 607 and the OPDC – On the issue of the timeliness of the application, the Board held that when the application was filed on the same day as a conciliation officer was appointed, the application was timely – Submissions ordered on status issues – Matter continues

A-1 SUPERIOR PAVING AND CONCRETE WORKS COMPANY INC.; RE DANIEL WILSON; RE LIUNA – CONSTRUCTION AND ALLIED WORKERS, LOCAL 607, AND LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .....(Jul./Aug.) 485

Construction Industry – Reconsideration – Termination – Timeliness – The Board found that an application for termination was timely because it was filed on the first day of the "commencement of the last three months" of the operation of a collective agreement (s. 63(2)(a)) – The union sought reconsideration of the Board's ruling – The Board confirmed that its calculation was not based on a "measure of time before or after a specified day," but on a plain reading of the statute, understandable to lay persons, of the moment in time when the three-month period began – Reconsideration allowed in part on other grounds

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 ..... (Jan./Feb.) 94

Construction Industry Grievance – Intervenor – Parties – Practice and Procedure – Local 804 sought remedies against the contractor for violating the mobility provisions of the provincial agreement when it employed members of Local 353 to connect and install high voltage cables and transformers at a warehouse project in the geographic jurisdiction of Local 804 – Local 353 sought to intervene – The Board found that while the potential displacement of Local 353's members may not be enough to establish a legal interest in the proceeding, the interpretation of section 17 of the ICI portion of the Principal Agreement, by which Locals 353 and 1687 act as a "clearing house" for line work done in the province of Ontario, does create that legal interest – Objection (to Local 353 participating) dismissed – Matter continues

PBW HIGH VOLTAGE LTD.; RE IBEW, LOCAL 894; RE IBEW, LOCAL 353; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ..... (Mar./Apr.) 275

Construction Industry Grievance – Judicial Review – The Board found that fire restoration work, performed by IBEW members, was regulated under the Provincial Agreement, rather than the GPMA, since the work was repair rather than maintenance – The Board also found that estoppel did not apply – At the request of the Union, the successful party, the Board issued further reasons – A majority of the court found: the appropriate standard of review to be reasonableness; the Board had the jurisdiction to issue supplemental reasons; that those reasons, while still "far from the thorough and careful reasons that are generally issued by members of this Board," were adequate; that the Board did not incorrectly define the issues; and that the Board did not err in applying the doctrine of estoppel – The court made it clear that simply because the Board reached a different conclusion in the application of the doctrine of estoppel from the decision of another panel, this did not make the decision unreasonable – Its decision was within the range of reasonable outcomes, given the facts before it – Application for judicial review dismissed

JACOBS CATALYTIC LTD.; RE IBEW, LOCAL 353; THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, GENERAL PRESIDENTS' MAINTENANCE COMMITTEE FOR CANADA AND THE OLRB ..... (May/June) 466

Construction Industry Grievance – *Occupational Health and Safety Act* – The union grieved the failure of the responding party to pay employees for specific training in asbestos removal required by a Regulation under the *Occupational Health and Safety Act* – The Board found that the employer had arranged for the training and had directed the employees to attend the three-day course – Pursuant to the provisions of the Regulation as well as the collective agreement, the responding party was responsible for compensating its employees who attended the training – Owners are equally responsible as employers for compliance with the Regulation – Grievance allowed

HIGH POINT ENVIRONMENTAL INC./HPE ENVIRONMENTAL INC.; RE LIUNA, LOCAL 506 ..... (Jul./Aug.) 521

Construction Industry Grievance – Practice and Procedure – Reconsideration – The applicant sought reconsideration of the Board's determination to award it only $2,500 in costs

rather than the full indemnity of $6,000 that it had requested – The Board held that costs on a "solicitor-and-client" basis do not entitle a party to *carte blanche* repayment of all its expenses – The Board's practice was that it would consider the reasonableness of the costs being sought; this was the first instance where an applicant's costs had been seriously challenged by a responding party – The applicant failed to provide the Board with any justification for the amount claimed – Reconsideration request denied

MAN-SHIELD (ONT.) CONSTRUCTION INC. A.K.A. MAN-SHIELD (NWO) CONSTRUCTION INC.; RE CJA, LOCAL 93 ET AL .....(Jan./Feb.) 72

Construction Industry Grievance – Practice and Procedure – Reconsideration – Settlement – The applicant sought reconsideration of a default award because the parties failed to advise the Board of a settlement they had reached prior to the issuance of the default decision – The applicant had originally sought a default decision if the responding party did not file an Intent to Defend, and no such filing occurred – The Board reconsidered its decision but admonished the parties for failing to advise the Board of their settlement, causing the Board to expend time and resources to review a file and issue an unnecessary decision – Reconsideration granted; application withdrawn

NORTH ROCK GROUP LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .....(Jul./Aug.) 548

Construction Industry Grievance – Practice and Procedure – The applicant failed to file and deliver its grievance referral to the responding party in accordance with s. 133 and Rule 34.2 [due to inadvertence in the solicitor's office, it was filed with the Board before being delivered to the employer] – The Board found it had the discretion under s. 133(4) to accept the referral, and, in these circumstances, did so, while also extending the time for the employer to respond – Grievance continues

VISTA SUDBURY HOTEL; RE LIUNA, LOCAL 493 .....(Jul./Aug.) 591

Contempt – Practice and Procedure – Remedies – In the context of this sale of business application, the Board ruled, in an earlier decision, that counsel for the union had breached a Confidentiality Order and an implied undertaking of confidentiality with respect to certain documents produced in the proceeding – The Board addressed the issue of relief available to the employer – The Board found that counsel for the union had aggressively denied having committed the breach for several months, then eventually admitted to it, apologized and claimed inadvertence – The Board determined that the issue of relief was a procedural matter and could be decided on the basis of written submissions – The Board issued a number of orders and declarations, including: (a) that both the union and its counsel breached the implied undertaking and the Confidentiality Order in several ways; (b) that the union and its counsel improperly reproduced the contents of the confidential document in question and improperly used information contained therein for their own purposes (the Board found that the confidentiality applied to both the union and the law firm and that the law firm was acting on behalf of the union) (c) that employer's counsel acted appropriately throughout the proceedings and there was no basis for the allegations of inappropriate or unprofessional conduct complained of by union counsel; (d) that the Confidentiality Order is permanent until the Board directs otherwise, subject to the caveat that the Order does not apply to documents that are otherwise available and were obtained other than through the production order in question; (e) that the law firm ensure that individual counsel do not communicate any information or disclose any documents obtained, or to be obtained, through production in the instant proceeding to anyone in the firm who is not engaged in

the instant proceeding or its corollaries; that counsel for the union advise the employer and its counsel of the steps taken to satisfy the obligations under the preceding directions – The Board declined to order that union counsel pay the employer's and its counsel's legal and other expenses incurred as a direct result of the vehement denial of wrongdoing, stating it did not have the jurisdiction to award such costs – The Board also refused to state a case to the Divisional Court asking the Court to inquire into the breach of the implied undertaking and the contempt of the Confidentiality Order, stating that the exercise of such discretion would not sufficiently further labour relations purposes since the underlying purpose of the request was to secure costs – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC., NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA, EAGLE LOGGING INC., BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC.; RE UNITED STEELWORKERS, LOCAL 1-2693; RE KOSKIE MINSKY LLP ..(May/June) 402

Crown Employees Collective Bargaining Act – Consent to Prosecute – Interim Relief – Sale of Business – Successor Rights – Unfair Labour Practice – AMAPCEO, representing Crown employees working in the Office of Child and Family Service Advocacy, whose duties and responsibilities were being transferred to the Provincial Advocate for Children and Youth (PACY) pursuant to the *Provincial Advocate for Children and Youth Act, 2007*, applied for a declaration of successor rights under s. 10 of *CECBA* – The Board found there was a transfer of an undertaking: all the components of the predecessor OCFSA were conferred to the successor PACY; all former clients of OCFSA continued as clients of PACY; the same management, supervising and directing the same work force in the same place also continued – The only change was that the employees were no longer Crown employees, but reported to the Legislature – The Board found that PACY failed to meet the onus of establishing that the Legislative privilege it alleged existed was closely and directly connected with the fulfillment of the duties and responsibilities of the Legislature – Board declared PACY to be successor employer; Consent to Prosecute withdrawn, other applications adjourned

THE CROWN IN RIGHT OF ONTARIO AND PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH; RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO ..... (Sept./Oct.) 622

Crown Employees Collective Bargaining Act – Practice and Procedure – Unfair Labour Practice – Witness – The matter involves events that occurred over twenty-five years ago that only came to light recently – The parties asked the Board to first determine whether it had the jurisdiction to hear a complaint that sections of the old CECBA had been breached (assuming the allegations made out a case, the complaint was timely, and the Board would grant a remedy) – Relying on the *Legislation Act*, the Board found that the complainants' rights came into existence under old CECBA, and its repeal did not affect those rights; new-CECBA repealed the old, such that new-CECBA proceedings were to be followed; and no contrary intention appeared – The Board also noted that rights must be vindicated in some forum and a purposeful analysis leads to the conclusion that the Board's specialized expertise is more appropriate, in these circumstances, than the courts – Accordingly, the Board has the jurisdiction to hear the complaint – Matter continues

GOVERNMENT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES; RE OPSEU, ROBERT GORDON, MICHAEL MCKINNON, WILLIAM BRADLEY, ROBERT MOREAU, JOE D'ANDREA AND STEPHEN LONSDALE .....(May/June) 395

Damages – Health and Safety – Remedies – Reprisal – The Board found in an earlier decision that the termination of the employee was not in breach of the OHSA, but occurred as a result of an argument between the president of the company and the employee – The Board discusses the policies underlying its discretion under s. 50(7), where it finds just cause to discipline, to substitute a penalty that seems just and reasonable in the circumstances – Since his employment was not subject to a collective agreement and he had no Employment Standards entitlements, the Board found that the employee's remedial position should be no better than if he pursued a claim for breach of contract of employment at common law – The Board, however, declined to exercise its discretion to award damages (which it found to be one month) since there was no evidence that the employee had any health and safety concerns or had exercised rights under the Act – Application dismissed

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY .....(Jan./Feb.) 111

Dependent Contractor – Certification – Construction Industry – Status – In this application for certification, the Applicant alleged that three individuals, McGowan, Page and Baker were all dependent contractors and therefore employees of Salzburg – The individuals conducted 90 to 100% of their work for Salzburg – McGowan and Page both provided work to Salzburg through business entities and were free to accept and refuse any projects, however, they rarely refused projects from Salzburg – There was very little supervision – The Board found that McGowan was a dependant contractor for the purposes of the *Labour Relations Act* – He was in a position of economic dependence upon Salzburg – Their relationship exhibited the same hallmarks as that of an hourly employee – Conversely, the Board found that Page and Baker were not employees of Salzburg – The evidence clearly showed that Page was the employer of Baker – All direction was provided by Page and not Salzburg – Page was an independent contractor, who had entered into a voluntary agreement with the Applicant and therefore was bound by a collective agreement – Matter continues

SALZBURG INTERIORS & FURNITURE LTD.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA .....(Jan./Feb.) 96

Discharge – Duty of Fair Representation – In this member's complaint against his bargaining agent, the Board found that the union's reliance on Canada Post's tracking system for registered mail to determine when the member received a recall notice did not encompass all the various possible interpretations of when delivery was effected – The union was ordered to obtain a legal opinion on "effective delivery" and to reconsider the member's complaint in light of that opinion – Application allowed in part

VIDAL, DAVID; RE NATIONAL AUTOMOBILE, AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW) LOCAL 462; RE BRR LOGISTICS LIMITED ..... (Mar./Apr.) 295

Discharge – Employment Standards – The employee applied for a review of the officer's refusal to award him termination pay – The Board found that the single outburst of profanity directed at a supervisor in this case did not warrant discharge without statutory notice or its monetary equivalent: the employee had an unblemished thirteen-year record with the employer; there was no specific rule or policy against the use of profanity in the workplace; the published policy of due process was not followed – Application allowed

WELSH INDUSTRIAL MANUFACTURING INC.; RE RAVINDRA PATEL AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Mar./Apr.) 300

Discharge – Employment Standards – The employee sought review of an officer's ruling that he had engaged in wilful misconduct when he refused to follow direction from his supervisor and subsequently would not apologize for his misbehaviour – The Board stated that one way to measure whether an employee's offence is sufficiently serious to disentitle the employee to termination pay is to determine if it would have been unreasonable for the employer to permit the employee to work out his or her notice period – In the instant matter, the employee was insubordinate and showed no remorse when asked to correct his conduct, consequently the employer had no obligation to keep the employee in the workplace for the notice period – Application dismissed

ARROW GAMES CORPORATION AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RICHARD MARQUIS ..... (Sept./Oct.) 610

Discharge – Employment Standards – Timeliness – Wilful Misconduct – Evidence – The applicant was terminated from his position as assistant manager of a grocery store following the alleged theft of some apples, an act that he denies doing (his evidence before the Board was uncontradicted) – The Ministry of Labour did not receive the applicant's claim until more than eight months after his termination – The Employment Standards Officer reasoned that she was prohibited from issuing an order under subsection 111(1) of the Act because more than six months had elapsed since the termination of employment – The Board held that the applicant's last day of work was not determinative of the issue since a proper analysis must take into account the nature of the wages and when they became due – The claim for unpaid wages was denied, but vacation pay was awarded – In considering whether the applicant was entitled to termination pay, the Board noted that the employer had simply told the applicant not to report to work until further advised – The Board held that the applicant was entitled to conclude that his employment was terminated 13 weeks after his last day worked; as such, any claim for outstanding wages, including termination pay, was clearly within the parameters of subsection 111(1) – Finally, the Board considered whether the applicant had been guilty of wilful misconduct so as to disentitle him to termination pay: since the employer failed to appear at the hearing (and there was no other evidence available that spoke directly to the alleged offence), there was insufficient evidence to conclude that the applicant was so guilty – Application allowed in part

NASR FOODS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RAFI KALTAKIAN .....(May/June) 440

Discharge – Health and Safety – Reprisal – The applicant alleged he had been penalized by a work transfer and a subsequent discharge for instituting a work refusal when he was assigned to drive a particular model of bus – The Board noted that it is generally not the Board's function to determine whether the applicant had been properly accommodated (under the *Human Rights Code*) or to inquire into his work refusal – The Board's focus is on whether the worker was penalized for "acting in compliance" with or "seeking the enforcement of" the *Occupational Health and Safety Act* – The worker must have had the right to refuse work when he exercised that right – The Board held that the applicant's transitional assignments were not a reprisal under the Act – Similarly, his discharge came about after he had been given ample opportunity to accept a transfer and he still insisted on withdrawing his service – Application dismissed

TORONTO TRANSIT COMMISSION; RE ANTHONY JAMES..... (Sept./Oct.) 695

Discharge – Interim Order – Unfair Labour Practice – The union sought interim reinstatement of five employees, pending resolution of the main application which alleged that they

were discharged for union activity – The employees worked as cleaners in a plant under construction, and were dismissed when the construction was completed – The Board held that the employees appeared to have been dismissed for their earlier union activity, because there was no other reasonable explanation for their dismissal – Although the construction work was over, the employer by its own admission needed many cleaners to work in the finished plant, and these employees were already trained and gave no cause for dismissal – The Board held that the discharges occurred during an organizing campaign; there was a serious issue to be tried; a failure to reinstate the workers would irreparably harm the union; and the reinstatement would not harm the employer – Interim order granted

MARTIN BUILDING MAINTENANCE; RE LIUNA, LOCAL 1059.....(Jul./Aug.) 538

Discharge – Interim Relief – Remedies – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 .....(Nov./Dec.) 760

Discharge for Union Activity – Interim Order – Remedies – Unfair Labour Practice – A key inside organizer, a day cleaner in the housekeeping department, was dismissed by the employer for allegedly disclosing to a staff member confidential information discarded by another employee – There was no dispute that the inside organizer had never been formally disciplined and had received compliments regarding her work, three star ratings from her employer and was employee of the month – There was no dispute between the parties that the circumstances giving rise to the pending proceeding occurred during a campaign and there was a serious issue to be decided – The Board found that although there was another inside organizer, B was key, in that she had collected four times the number of cards as the other organizer and hence her removal would cause the union irreparable harm – Furthermore, the balance of harm favoured the union in that there was little it could do to counter the loss of a key inside organizer, while there were safeguards the employer could put into place to guard against the possibility that B was disclosing information – Finally, the Board found an appearance of a causal connection between B's right to participate in union organizing and her termination: she had no formal discipline and had received commendations; five days after receiving information of her union activities the employer, after receiving some information alleging improper

conduct by B, failed to investigate and did not put the allegations to B – Particulars of the alleged improper conduct were not put to B, nor were these provided in the letter of termination – Interim Reinstatement to same position ordered, with other declarations – Main application proceeds

FIVE BROTHERS HOSPITALITY PARTNERSHIP LIMITED C.O.B. HOLIDAY INN ST. CATHARINES; RE UNITE HERE ..... (Sept./Oct.) 633

Duty of Fair Representation – Discharge – In this member's complaint against his bargaining agent, the Board found that the union's reliance on Canada Post's tracking system for registered mail to determine when the member received a recall notice did not encompass all the various possible interpretations of when delivery was effected – The union was ordered to obtain a legal opinion on "effective delivery" and to reconsider the member's complaint in light of that opinion – Application allowed in part

VIDAL, DAVID; RE NATIONAL AUTOMOBILE, AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW) LOCAL 462; RE BRR LOGISTICS LIMITED ..... (Mar./Apr.) 295

Duty of Fair Representation – Employment Standards – The employee alleged unfair treatment at the union's hands when it failed to pursue a grievance on his behalf for termination and severance pay – The employee, following a lay-off of 34 weeks, was recalled to work and shortly thereafter elected to take a "preferred lay-off" under the collective agreement and resigned his employment – He then asked the union to assist him in obtaining his entitlements under the *Employment Standards Act* – The union sought advice from the Ministry of Labour as well as its own counsel with respect to the employee's entitlements – Both the ministry and the union's lawyer stated that an employee who elects to take a preferential lay-off cannot use those weeks toward severance entitlements – The applicant was subsequently advised by the ministry that a preferred lay-off did constitute a lay-off under the ESA – The Board, without deciding if the advice the union received and subsequently conveyed to the applicant was correct, found that it was not so wrong as to be arbitrary – Application dismissed

SCOTT WAYLAND; RE THOMPSON PRODUCTS EMPLOYEES' ASSOCIATION ..... (Nov./Dec.) 825

Duty of Fair Representation – Judicial Review – Practice and Procedure – Unfair Labour Practice – The court held that it is not the function of the Board, in determining a duty of fair representation complaint, to review the merits of an arbitration award or the procedural decisions that the arbitrator made – The Board had no jurisdiction to determine whether the Employer violated the collective agreement or other statutes governing the employment relationship – The decision not to allow the Board proceedings to be recorded is within the Board's discretion pursuant to s. 110(16) provided it gives full opportunity to the parties to present their evidence and to make submissions – The Board did not act improperly or offend the rules of procedural fairness when it refused to permit the reporter – The Board was reasonable in directing that the applicant seek leave of the Board prior to bringing another s. 74 complaint against the Union – The conclusion that the repeated allegations of s. 74 violations against the Union had become an abuse of process was reasonably made in an effort to control the Board's process – Application for Judicial Review dismissed

GUS NEDELKOPOULOS; OLRB; RE A.G.S. AUTOMOTIVE OSHAWA AND C.A.W. LOCAL 222 ..... (Mar./Apr.) 314

Duty of Fair Representation – Judicial Review – Practice and Procedure – Procedural Fairness – At the Board the complainant alleged that the union unfairly responded to her removal from the occasional teachers' list – She was removed from the list after refusing the school board's request to not disseminate her views (that there is a conspiracy involving the Catholic Church, the "Black Pope" and the Illuminati) in the classroom – An initial settlement was reached in which the union agreed to investigate whether a grievance could be filed and where the complainant agreed to an assessment from a psychiatrist – The complainant ultimately refused to cooperate, and the Board found the union had met its duty of fair representation – The court found that the Board's decision was reasonable as there was ample evidence to suggest the union's request for a psychiatric assessment was reasonable and that she had failed to cooperate with it – Additionally the Board's use of a "consultation" did not breach procedural fairness as s. 99 allows the Board to determine a matter without a hearing after "consulting with the parties" and the Board consulted meaningfully with both sides – Application dismissed

HOROCHOWSKI, DANA; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, YORK CATHOLIC DISTRICT SCHOOL BOARD, OLRB.....(Sept./Oct.) 742

Duty of Fair Representation – Judicial Review – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

GRANTLEY, HOWELL; RE UNITED STEELWORKERS OF AMERICA, LOCAL 7135; OLRB.....(Jan./Feb.) 121

Duty of Fair Representation – Practice and Procedure – The Board was asked for an Order to remove an agent as representative of the complainants – The Board found the representative was providing legal services in contravention of the *Law Society Act* (he was not licensed, nor exempted from the requirements) – The Board found it had the authority to make the order requested pursuant to its procedural powers and s. 23 of the *SPPA* – The Board noted parties' desires to be represented by the individual of their choice, however this must now be considered in light of the recently enacted paralegal licensing requirements which have changed the landscape – Although the Board recognized there may be circumstances where it might permit such a representative to continue, this case, which had been freshly filed, was not one of them – Representative removed as agent for complainant

NANCY GULYAS, SYLVIA JOHNSON et al; RE OPSEU AND ITS LOCAL 380; RE MUSKOKA ALGONQUIN HEALTHCARE.....(May/June) 436

Duty of Fair Representation – Practice and Procedure – The Board was asked to order that an agent not be permitted to represent a party before the Board – The Board found that the agent did not meet the recently enacted paralegal licensing requirements, nor did he meet any of the exemptions set out in the Law Society's By-laws – The Board found that it could exercise its discretion to make an order under its procedural powers and s. 23 of the *SPPA* – The Board removed the agent as representative of record in the case before it, but decided at this time not to make a blanket order – The Board did note that continued appearances by an unauthorized individual in new proceedings before the Board or a failure by the individual to arrange the orderly transfer of existing files to

authorized representatives might lead the Board to consider a broader order – Representative removed as agent for complainant

TRACIE JONES; RE OPSEU; RE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES.....(May/June) 459

Employee – Certification – Status – The parties could not agree on whether certain employees were full-time or part-time – The employees in dispute ("Casual Maintenance Workers/ Operators – On Call") were paid for a minimum of twenty-five hours per week and were required to hold themselves available to the employer for those hours, albeit not at the workplace – The employer argued that these were part-time employees, relying on the Board's jurisprudence ("regularly employed for not more than twenty-fours hours" in four of the last seven weeks leading up to the application for certification) and asserting that the Board should consider "hours worked" as opposed to "hours paid" – The Board held that the disputed employees were required to demonstrate a full-time commitment to the employer and therefore should be included in the full-time bargaining unit – Count ordered

TWD ROADS MANAGEMENT INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....(Jul./Aug.)

Employee – Final Offer Vote – Reference – On a Ministerial reference the Board was asked for advice on whether two employees (one with recall rights and an active competition grievance, the other with an active discharge grievance) were "employees in the affected bargaining unit" pursuant to s. 42(1) of the Act – Included in the employer's last offer was a requirement that the union withdraw all outstanding grievances, including the two affecting these employees – Given their interest in the outcome of the vote (possible reinstatement or extinguishment of their potential right to return to work), the Board followed earlier jurisprudence in *Dan Harris* [*Hall v. Graphic Communications*] and *Satisfied Brake* and advised the Minister that the two individuals' votes were eligible to be counted – Advice provided

ANISHNAWBE MUSHKIKI HEALTH CENTRE; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 7-0..... (Sept./Oct.) 603

Employer – Bargaining Rights – Constitutional Law – Construction Industry – Termination – The Independent Electricity Market Operator, currently called the Independent Electricity System Operator (IESO), sought a declaration that it was a non-construction employer because it was a consumer of construction services and not a vendor of same – If such a declaration were to issue from the Board, the unions reserved the right to challenge the constitutionality of the non-construction employer provisions – The IESO has two main functions: (1) to ensure the reliable operation of the electrical power system in Ontario; and (2) to operate the wholesale electricity market in Ontario (including a price-setting function) – The IESO is neither a generator nor a transmitter of electricity; it ensures the reliability of the electrical power system in the province through market rules and operating agreements with various market participants – There was no dispute that the IESO engages contractors from time to time to perform construction work for its own benefit – The Board found that market fees paid to the IESO by market participants are not the kind of compensation contemplated by the definition of a non-construction employer – The Board found the situation in the present case to be similar to government funding provided to a school board that the board uses to pay for construction activity: the funds are not paid in order for construction work to

be performed for the benefit of the giver of the funds – Non-construction employer declaration granted – Matter referred to Registrar to schedule constitutional argument

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE LIUNA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059 ..... (Mar./Apr.) 210

Employer – Certification – Construction Industry – The Labourers sought certification of a unit of employees the union alleged were employed by one of the Monarch companies – Both Monarch and the intervenor challenged the application, arguing that the real employer was the intervenor, a personnel placement agency – The Board found that the employees were hired by the intervenor and assigned to Monarch; Monarch had no employees of its own working at its sites; disciplinary issues were handled by the intervenor; the intervenor re-assigned employees when they were no longer needed at Monarch; the intervenor bore responsibility for remuneration, paying the employer share of benefits, wages and bonuses – The Board was satisfied that fundamental control over the employees rested with the intervenor – Application dismissed

MONARCH CORPORATION AND MONARCH DEVELOPMENT CORPORATION; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE THE K.A.S. GROUP OF COMPANIES ..... (Jan./Feb.) 76

Employer Initiation – Bargaining Rights – Evidence – Termination – In an application seeking to terminate the bargaining rights of the union, the Board found that although there was very little direct evidence establishing that the employer initiated the application, the union was perfectly entitled to meet its onus through circumstantial evidence – The employee's evidence concerning his motivation for filing the application was not credible – He was not honest regarding how he became aware that a termination application could be filed, when such an application would be timely under the LRA and in describing his alleged motivation for bringing the application – The only natural explanation the Board could draw from his dishonesty was the desire to cover up the fact that his employer initiated the application – Application dismissed

2890275 CANADA INC. O/A ENER-TECH; RE PATRICK POISSON RE IBEW, LOCAL 586 ..... (Mar./Apr.) 123

Employer Support – Certification – Construction Industry – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

PRE-ENG CONTRACTING LTD.; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, LOCAL 506; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNTED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (Mar./Apr.) 284

Employment Standards – Abandonment – Fraud – Settlement – The two directors agreed to settle the review of orders to pay with 4 of 7 claimants – Irwin paid his portion of the settlement; when Diena failed to make any of the promised payments, the claimants sought to rescind the settlement and reinstate the original Order on grounds of fraud – The Board found that the claimants were fraudulently induced to enter into the settlement because although Diena had the means to pay the settlement, it appears he had no intention to do so – Diena's failure to attend the hearing was further evidence of his lack of commitment to the settlement – The Board voided the settlement and reinstated the full Order to Pay, less monies already paid by Irwin – As for the other 3 claimants, since Diena failed to appear at the hearing, the Board considered his application against them to be abandoned

DANIEL DIENA, A DIRECTOR OF DELES INDUSTRIES LIMITED; RE MICHAEL J. ASHTON, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS...(Jul./Aug.) 510

Employment Standards – Adjournment – Judicial Review – Natural Justice – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL .....(Nov./Dec.) 863

Employment Standards – Constitutional Law – The applicant sought review of an employment standards officer's refusal to issue an order to pay in circumstances where she alleged she was deprived of her position following a pregnancy leave – The Board first determined that the employer, a logistics company that coordinated international and interprovincial transportation of goods, was a provincial undertaking and subject to Ontario laws – On the substantive issue, the Board held that the legislation requires an employee returning from pregnancy leave to be returned to her original position (or if it no longer exists a comparable one), but not necessarily to all the duties and responsibilities that position entailed – The transfer of certain client accounts to other employees was not a penalty under the Act – Application dismissed

PINNACLE FREIGHT SPECIALISTS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ARDELLE D. STONER .....(Jul./Aug.) 555

Employment Standards – Discharge – The employee applied for a review of the officer's refusal to award him termination pay – The Board found that the single outburst of profanity directed at a supervisor in this case did not warrant discharge without statutory notice or its monetary equivalent: the employee had an unblemished thirteen-year record with the employer; there was no specific rule or policy against the use of profanity in the workplace; the published policy of due process was not followed – Application allowed

WELSH INDUSTRIAL MANUFACTURING INC.; RE RAVINDRA PATEL AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Mar./Apr.) 300

Employment Standards – Discharge – The employee sought review of an officer's ruling that he had engaged in wilful misconduct when he refused to follow direction from his supervisor and subsequently would not apologize for his misbehaviour – The Board stated that one way to measure whether an employee's offence is sufficiently serious to disentitle the employee to termination pay is to determine if it would have been unreasonable for the employer to permit the employee to work out his or her notice period – In the instant matter, the employee was insubordinate and showed no remorse when asked to correct his conduct, consequently the employer had no obligation to keep the employee in the workplace for the notice period – Application dismissed

ARROW GAMES CORPORATION AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RICHARD MARQUIS ..... (Sept./Oct.) 610

Employment Standards – Discharge – Timeliness – Wilful Misconduct – Evidence – The applicant was terminated from his position as assistant manager of a grocery store following the alleged theft of some apples, an act that he denies doing (his evidence before the Board was uncontradicted) – The Ministry of Labour did not receive the applicant's claim until more than eight months after his termination – The Employment Standards Officer reasoned that she was prohibited from issuing an order under subsection 111(1) of the Act because more than six months had elapsed since the termination of employment – The Board held that the applicant's last day of work was not determinative of the issue since a proper analysis must take into account the nature of the wages and when they became due – The claim for unpaid wages was denied, but vacation pay was awarded – In considering whether the applicant was entitled to termination pay, the Board noted that the employer had simply told the applicant not to report to work until further advised – The Board held that the applicant was entitled to conclude that his employment was terminated 13 weeks after his last day worked; as such, any claim for outstanding wages, including termination pay, was clearly within the parameters of subsection 111(1) – Finally, the Board considered whether the applicant had been guilty of wilful misconduct so as to disentitle him to termination pay: since the employer failed to appear at the hearing (and there was no other evidence available that spoke directly to the alleged offence), there was insufficient evidence to conclude that the applicant was so guilty – Application allowed in part

NASR FOODS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RAFI KALTAKIAN ..... (May/June) 440

Employment Standards – Duty of Fair Representation – The employee alleged unfair treatment at the union's hands when it failed to pursue a grievance on his behalf for termination and severance pay – The employee, following a lay-off of 34 weeks, was recalled to work and shortly thereafter elected to take a "preferred lay-off" under the collective agreement and resigned his employment – He then asked the union to assist him in obtaining his entitlements under the *Employment Standards Act* – The union sought advice from the Ministry of Labour as well as its own counsel with respect to the employee's entitlements – Both the ministry and the union's lawyer stated that an employee who elects to take a preferential lay-off cannot use those weeks toward severance entitlements – The applicant was subsequently advised by the ministry that a preferred lay-off did constitute a lay-off under the ESA – The Board, without deciding if the advice the union received and subsequently conveyed to the applicant was correct, found that it was not so wrong as to be arbitrary – Application dismissed

SCOTT WAYLAND; RE THOMPSON PRODUCTS EMPLOYEES' ASSOCIATION ..... (Nov./Dec.) 825

Employment Standards – Employers, caring for adult schizophrenics, sought review of an ESO's decision that their employees did not fall within the statutory meaning of "residential care worker" under Regulation 285/01 of the ESA – The Board accepted the definition in *Pacaldo* and the ESA Interpretation Manual that for a person to be found to be developmentally handicapped the handicap must have occurred during the person's formative years (namely, before 18 years) – Given that there was no evidence before the Board suggesting an onset of schizophrenia before the age of 18 with any of the residents, the Board found that none of the residents met the definition of "developmentally handicapped" and hence the employees were not residential care workers – The Board also noted that the purpose of the ESA and its exemptions is to protect the entitlement of workers to basic working conditions – Application dismissed

LORRAINE FRASER VISCOUNT RESIDENCE; RE MS. SHIRLEY COYEA AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Mar./Apr.) 257

Employment Standards – Judicial Review – Practice and Procedure – The Applicant sought judicial review of a Board decision upholding an Officer's refusal to issue an order to pay outstanding wages to him – The Board had found that the Applicant was not an employee at the relevant time – On judicial review, the Court held that the Board was correct not to postpone its own proceedings until the Applicant's Tax Court matter on Employment Insurance eligibility was resolved – Employment Insurance proceedings have different statutory schemes, purposes, parties, and available remedies, so their results are inapplicable to *Employment Standards Act* proceedings – Based on the evidence, the Board had reasonably decided that the Applicant was not an employee – Alternatively, the Board had found that no wages were owed to the Applicant, because the Applicant had already been paid substantially more than the minimum wage – Since the Applicant had led no evidence of his actual wage rate, the Board's reliance on the minimum wage was reasonable – The Applicant also complained that the Board's decision was libellous, in that it contained negative assessments of his credibility – The Divisional Court held that Vice-Chairs of the Board are protected from libel and slander claims – Application for judicial review dismissed

DR. OLIVER BAJOR; RE ARBITRAGE RESEARCH AND TRADING LTD., MINISTRY OF LABOUR AND OLRB ..... (Jul./Aug.) 594

Employment Standards – Judicial Review – The Board refused the employer's request to extend the time for a review of an order to pay – Through solicitor's inadvertence the request was made six months after the receipt of the order to pay – The court found that the appropriate standard of review for the Board's discretionary decision was reasonableness – In making its decision the Board looked at the purposes of the Act and presumptive prejudice, but did not assess the merits of the claim – The court noted there was no consistent authority at the Board that the merits of the claim should be considered, and in any event the court assessed the applicant's claim that the ESO was wrong, and found it open to interpretation – The court found the Board's decision reasonable – Application dismissed

SOLID GOLD INN, 848347 ONTARIO LIMITED O/A; RE CHRISTINE LOWE, MOL AND OLRB ..... (Sept./Oct.) 745

Employment Standards – Practice and Procedure – Settlement – Almost four years after the settlement of this application for review, the employer sought the Board's permission to compel a labour relations officer to testify on its behalf in a wrongful dismissal suit filed by the employee – The employee's assertion in the civil suit was that she could not read

English at the time she entered into the settlement; the employer wanted the officer to give evidence about the employee's language abilities and describe the nature of her discussions with the employee – The Board reiterated its long held view regarding the importance of maintaining confidentiality in the mediation process - In addition, in the Board's view, there were other ways in which the employer could ascertain the employee's proficiency in the language; the labour relations officer could not be an expert on this aspect of the case – Request denied

OCTOBER ENTERPRISES INCORPORATED; RE RASHIDA (SHEILA) KARMALI AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sept./Oct.) 667

Employment Standards – Reprisal – The employer sought review of an order for compensation awarded to the employee for an alleged violation of the pregnancy/parental provisions of the Act – The Board found that although the circumstances surrounding the employee's departure from the workplace were clumsy and confusing, and an e-mail sent by a manager to staff was unequivocal that the employee was not returning to the workplace, the employer clarified its position with respect to the employee's status in subsequent communication with the employee's counsel – The Board ruled that it was what the employer actually did, and why, rather than what the employee believed to have happened, that determines the outcome of the review – The Board found that the employee had been granted parental leave, and that he never sought or offered to return to work – Application allowed

SKIIS LTD.; RE KEVIN ST. AUBIN AND DIRECTOR OF EMPLOYMENT STANDARDS .....(May/June) 454

Employment Standards – Sale of a Business – The employees sought payment of termination pay when Lamantia transferred a lease for a vendor stall to Ippolito at the Ontario Food Terminal – The Board found that the Court of Appeal had recently rejected the traditional "going concern" model for a sale of business in *Abbott v. Bombardier Inc.*, and had expanded the parameters of a transaction to include the transfer of a bundle of tasks and functions performed by an identifiable group of employees – In this case, the employees continued performing the same work for Ippolito, and Ippolito had in fact expanded its own operations to carry on the business of Lamantia – The Board found there was continuity in the employment of the employees and they were consequently not entitled to termination pay – Application dismissed

LAMANTIA GARCIA PRODUCTS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ERWIN REVIN, ANTONIO CARVALHO, JOSE TOSTE AND NAMGYAL KALSANG; RE IPPOLITO PRODUCE LIMITED .....(Jan./Feb.) 67

Employment Standards – The Board found that a six-year employee with a regular work week of thirty-five hours who had his hours reduced to eight per week, with the concomitant diminution in pay, was constructively dismissed – There was no implied term or condition in his employment relationship that suggested or anticipated such a dramatic cut, and this was not a lay-off – The employee's subsequent resignation was found to be a reasonable response initiated within a reasonable time of the implemented changes, in accordance with s. 56(1)(c) of the Act –Application granted

DR. MICHAEL BLACKMORE AND DIRECTOR OF EMPLOYMENT STANDARDS; RE JOHN DANIELS .....(Nov./Dec.) 772

Employment Standards – The employer appealed an order for compensation, asserting that the discharged employee had been employed on a fixed term contract – The evidence showed a longstanding employment relationship that evolved from childcare in the employer's home to office work in her dental practice – The Board found that the alleged fixed-term document was not sufficiently clear to specify an end to the employment, nor did the parties' conduct support such an effect – When the employee returned from her pregnancy leave, she was entitled to reinstatement – The Board was not persuaded that there was no position to which the employee could be returned – Application dismissed; quantum varied

JUDITH BUYS DENTISTRY PROFESSIONAL CORPORATION; RE TRACY PARKER AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sept./Oct.) 641

Employment Standards – The employer sought review of an order requiring it to pay termination pay and overtime to the employee, arguing that it had given the employee adequate written notice of proposed changes to the terms of employment – The employee submitted that she never acceded to the proposed changes, and was constructively dismissed – The Board found that although the employer provided the employee in writing with certain changes it was contemplating in the future, it in fact made certain immediate alterations to the employee's work conditions (changing from a salary to hourly wage; eliminating religious holidays; restricting flexibility in start time) without proper notice – The Board also found that the employee resigned within a reasonable time in response to these changes, triggering a finding of constructive dismissal – Application dismissed

730372 ONTARIO LIMITED o/a BLOW MOULD ENGINEERING; RE ROZANA FIRER AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (May/June) 319

Employment Standards – The employer sought review of an order to pay wages, alleging that the employee had taken various items when he left the company, and that he had provided a written authorization to make a deduction when he took vacation days he had not yet accrued – The Board held that an employer cannot withhold wages because of allegations of theft or because it is seeking to recover the value of items purportedly removed by the employee through other proceedings – The Board ruled, however, that s. 13 of the Act is not so prescriptive as to prevent an employer from recovering an overpayment, provided the deduction occurs within a reasonable time; in such circumstances, the recovery is not a "set-off" – Application allowed in part

MENUPALACE.COM CORPORATION; RE VINCE SALADINO AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (May/June) 424

Environmental Protection Act – Practice and Procedure – Reprisal – Timeliness – The employer argued that this reprisal application should be dismissed because it is precluded by the doctrines of issue estoppel and abuse of process, in addition to being untimely – The Board found that an arbitration panel in a grievance proceeding had fully considered the issues raised by the applicant in this reprisal complaint, even when the union had withdrawn the reprisal component of the grievance during final argument before the arbitration board – The Board also found that the application was untimely; rather than filing immediately after the impugned conduct, the applicant waited until the decision of the arbitration board to make his claim – Application dismissed

CITY OF OTTAWA; RE TED COOPER ..... (Jul./Aug.) 507

Evidence – Bargaining Rights – Employer Initiation – Termination – In an application seeking to terminate the bargaining rights of the union, the Board found that although there was very little direct evidence establishing that the employer initiated the application, the union was perfectly entitled to meet its onus through circumstantial evidence – The employee's evidence concerning his motivation for filing the application was not credible – He was not honest regarding how he became aware that a termination application could be filed, when such an application would be timely under the LRA and in describing his alleged motivation for bringing the application – The only natural explanation the Board could draw from his dishonesty was the desire to cover up the fact that his employer initiated the application – Application dismissed

2890275 CANADA INC. O/A ENER-TECH; RE PATRICK POISSON RE IBEW, LOCAL 586 ..... (Mar./Apr.) 123

Evidence – Certification – Construction Industry – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ..... (Nov./Dec.) 803

Evidence – Construction Industry – Practice and Procedure – Related Employer – Sale of Business – Union sought to have admitted thirty year old documents as "business records," specifically a letter commenting on the binding nature of a collective agreement – The employer objected arguing that it was caught in an impossible position as it must find the author or another witness to give evidence about documents that apparently created some 30 years ago have played no role in the corporation's existence since that time – The Board found the records were not admissible pursuant to s. 35(2) of the *Evidence Act*, in that the record did not meet any of the conditions set out in the subsection – The Board also found that even if s. 111(2)(c) of the *LRA, 1995* created a wider scope than s. 35, it would not admit the record because the documents are expressions of opinion by parties whose source of information and belief cannot be ascertained, and therefore no weight could be placed on them – Additionally, the Board applied the rule in *Browne v. Dunn* and did not admit evidence that contradicted earlier testimony by a witness where the contradiction was not put to the witness during cross examination – Matter continues

CADILLAC FAIRVIEW COROPORATION LTD., THE, CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS

INC. AND REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795 .....(Jul./Aug.) 491

Evidence – Discharge – Employment Standards – Timeliness – Wilful Misconduct – The applicant was terminated from his position as assistant manager of a grocery store following the alleged theft of some apples, an act that he denies doing (his evidence before the Board was uncontradicted) – The Ministry of Labour did not receive the applicant's claim until more than eight months after his termination – The Employment Standards Officer reasoned that she was prohibited from issuing an order under subsection 111(1) of the Act because more than six months had elapsed since the termination of employment – The Board held that the applicant's last day of work was not determinative of the issue since a proper analysis must take into account the nature of the wages and when they became due – The claim for unpaid wages was denied, but vacation pay was awarded – In considering whether the applicant was entitled to termination pay, the Board noted that the employer had simply told the applicant not to report to work until further advised – The Board held that the applicant was entitled to conclude that his employment was terminated 13 weeks after his last day worked; as such, any claim for outstanding wages, including termination pay, was clearly within the parameters of subsection 111(1) – Finally, the Board considered whether the applicant had been guilty of wilful misconduct so as to disentitle him to termination pay: since the employer failed to appear at the hearing (and there was no other evidence available that spoke directly to the alleged offence), there was insufficient evidence to conclude that the applicant was so guilty – Application allowed in part

NASR FOODS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RAFI KALTAKIAN .....(May/June) 440

Final Offer Vote – Employee – Reference – On a Ministerial reference the Board was asked for advice on whether two employees (one with recall rights and an active competition grievance, the other with an active discharge grievance) were "employees in the affected bargaining unit" pursuant to s. 42(1) of the Act – Included in the employer's last offer was a requirement that the union withdraw all outstanding grievances, including the two affecting these employees – Given their interest in the outcome of the vote (possible reinstatement or extinguishment of their potential right to return to work), the Board followed earlier jurisprudence in *Dan Harris* [*Hall v. Graphic Communications*] and *Satisfied Brake* and advised the Minister that the two individuals' votes were eligible to be counted – Advice provided

ANISHNAWBE MUSHKIKI HEALTH CENTRE; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 7-0..... (Sept./Oct.) 603

Fraud – Abandonment – Employment Standards – Settlement – The two directors agreed to settle the review of orders to pay with 4 of 7 claimants – Irwin paid his portion of the settlement; when Diena failed to make any of the promised payments, the claimants sought to rescind the settlement and reinstate the original Order on grounds of fraud – The Board found that the claimants were fraudulently induced to enter into the settlement because although Diena had the means to pay the settlement, it appears he had no intention to do so – Diena's failure to attend the hearing was further evidence of his lack of commitment to the settlement – The Board voided the settlement and reinstated the full Order to Pay, less monies already paid by Irwin – As for the other 3 claimants, since Diena failed to appear at the hearing, the Board considered his application against them to be abandoned

DANIEL DIENA, A DIRECTOR OF DELES INDUSTRIES LIMITED; RE MICHAEL J. ASHTON, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS...(Jul./Aug.) 510

Health and Safety – Damages – Remedies – Reprisal – The Board found in an earlier decision that the termination of the employee was not in breach of the OHSA, but occurred as a result of an argument between the president of the company and the employee – The Board discusses the policies underlying its discretion under s. 50(7), where it finds just cause to discipline, to substitute a penalty that seems just and reasonable in the circumstances – Since his employment was not subject to a collective agreement and he had no Employment Standards entitlements, the Board found that the employee's remedial position should be no better than if he pursued a claim for breach of contract of employment at common law – The Board, however, declined to exercise its discretion to award damages (which it found to be one month) since there was no evidence that the employee had any health and safety concerns or had exercised rights under the Act – Application dismissed

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY .....(Jan./Feb.) 111

Health and Safety – Discharge – Reprisal – The applicant alleged he had been penalized by a work transfer and a subsequent discharge for instituting a work refusal when he was assigned to drive a particular model of bus – The Board noted that it is generally not the Board's function to determine whether the applicant had been properly accommodated (under the *Human Rights Code*) or to inquire into his work refusal – The Board's focus is on whether the worker was penalized for "acting in compliance" with or "seeking the enforcement of" the *Occupational Health and Safety Act* – The worker must have had the right to refuse work when he exercised that right – The Board held that the applicant's transitional assignments were not a reprisal under the Act – Similarly, his discharge came about after he had been given ample opportunity to accept a transfer and he still insisted on withdrawing his service – Application dismissed

TORONTO TRANSIT COMMISSION; RE ANTHONY JAMES..... (Sept./Oct.) 695

Health and Safety – Ontario Power Generation (supported by the Power Workers' Union and the Society of Energy Professionals) sought suspension of an order requiring it to produce the results of an internal investigation following a workplace mishap which caused minor injuries to a maintenance worker – The OPG submitted that it asked the MOL inspector if he was conducting an inspection or an investigation when he sought production of the report, and was told that he was conducting an investigation – OPG argued that the distinction between an inspection and an investigation is the subject of continuing *Charter* litigation, and the requirement to disclose the report would irretrievably prejudice its position in any potential prosecution – The Board considered the standard criteria for suspension requests and determined that there was no threat to worker safety; the inspector will not be precluded from continuing his investigation or issuing other orders if the order is suspended (i.e., if production is denied), whereas OPG's position will be severely prejudiced if the report is ordered released to the Ministry; OPG has made a strong *prima facie* case in favour of the suspension – Suspension granted – Appeal forwarded to Registrar for scheduling

ONTARIO POWER GENERATION INC.; RE POWER WORKERS' UNION, SOCIETY OF ENERGY PROFESSIONALS AND DOUGLAS CETTINA, MINISTRY OF LABOUR.....(May/June) 446

Health and Safety – Practice and Procedure – Timeliness – After the inspector reviewed the applicant's complaint at the workplace, the applicant was advised there was no contravention of the Act – The inspector did not issue an Order – The inspector returned to the workplace three days later and provided the employer with a Field Visit report, but did not provide the complainant with the report – There is no provision in the Act requiring the inspector to confirm in writing the refusal to issue an order, nor requiring the inspector to provide the complainant with the Field Visit report until it is asked for – The applicant appealed to the Board within 30 days of having received the Field Visit report, but beyond the 30 days of the Inspector's decision not to issue an order – The Board found the appeal untimely – Appeal dismissed

CASTONGUAY BLASTING GP AND CLAUDE NADON, INSPECTOR; RE STEVEN MROCZYNSKI.....(Jul./Aug.) 504

Health and Safety – Reprisal – The applicant claimed that he had been subject to reprisals for raising health and safety concerns when he was laterally transferred from the position of Radiation Supervisor in the Solid Waste Management Services Division to his former position as Shift Supervisor, and also removed from the Divisional Health and Safety Committee – While occupying the position of Radiation Supervisor, the applicant made various complaints to his supervisors, and to persons to whom they reported, concerning "health & safety concerns", while also complaining that he did not have sufficient time to adequately do all the tasks assigned to him and that his job required more time and energy than could reasonably be expected of one individual (a perceived problem he continually emphasized, notwithstanding the opposite conclusions reached in the resulting audit process) – The city maintained that the applicant's lateral transfer was the result of his expressed inability to adequately perform his assigned duties, and was not disciplinary in nature – The Board found that the applicant's permanent reassignment to the position of Shift Supervisor was wholly in response to his consistent workload complaints, and so was not a reprisal within the meaning of the Act – As such, the city had satisfied its evidentiary burden of establishing that the reassignment was free of any taint of reprisal for voicing health and safety concerns – Application dismissed

CITY OF TORONTO; RE JOHN A. HARWOOD.....(May/June) 352

Health and Safety – The Employer, supported by the union, sought suspension of an Order directing it to cease using a device that lifted workers on a platform some 45 feet to work on roofs, until a guard rail system that had been removed was repaired and certified to meet the manufacturer's specifications – The applicant asserted that the fall arrest system it required workers to use, together with its training provided protection at least equal to the protection afforded to workers by the guardrail – The Board found that if the removal of the guardrail system had not raised a concern about the stability of the platform, then the applicant would have demonstrated the fall arrest systems and its training and supervision were sufficient – The Board however found that the applicant had failed to provide any material from the manufacturer to indicate that the removal of the guard rail on one side of the platform would not affect the integrity of the platform or its stability – The absence of such information together with the material filed by the inspector from the manufacturer that modifications should not occur without its consent, led the Board to conclude that the applicant had failed to demonstrate a strong *prima facie* case – Request to suspend dismissed

TRUDEL & SONS ROOFING LTD.; CARPENTERS AND ALLIED WORKERS, LOCAL 27, CJA; GORAN BLANUSA, INSPECTOR .....(Jul./Aug.)

Health and Safety – The inspector issued orders arising from the school board's refusal to permit a worker member, who was only present at the workplace in question one day a week, to act on the joint health and safety committee (JHSC) – The school board argued that members of the JHSC must have a significant, regular, principal connection to the workplace – The Board found that the Act did not require a worker to have such a connection to the workplace, but rather that he or she must only be employed at the workplace and selected by the workers – The Board declared that the school board's refusal to allow the worker to act on the JHSC was a breach of the Act

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION, DISTRICT 9; CUPE, LOCALS 27 & 1348; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO AND RICK TAGGART, INSPECTOR.....(Jul./Aug.) 514

Health and Safety – Timeliness – The applicant filed a request for suspension of an inspector's order on Form A-67 twenty-nine days after the order was issued, but did not file an appeal of the order within the 30-day time limit set out in s. 61(1) of the *Occupational Health and Safety Act* – The issue before the Board was whether the appeal was timely – The Board found that all the information required to initiate an appeal was contained in Form A-67, and the Board's Rules of Procedure allow it to relieve against the strict application of the Rules – The Board relieved against the strict application of Rule 22.1 which requires an appeal to be launched on Form A-65 – The late-filed form was viewed as an amendment of the timely appeal filed four days earlier – Matter proceeds

DYNAMIC PROPERTIES INC.; RE RICK CARPENTER, JOSIE ROQUE AND DAVE MACDONALD, INSPECTOR.....(Nov./Dec.) 775

Interim Order – Discharge – Unfair Labour Practice – The union sought interim reinstatement of five employees, pending resolution of the main application which alleged that they were discharged for union activity – The employees worked as cleaners in a plant under construction, and were dismissed when the construction was completed – The Board held that the employees appeared to have been dismissed for their earlier union activity, because there was no other reasonable explanation for their dismissal – Although the construction work was over, the employer by its own admission needed many cleaners to work in the finished plant, and these employees were already trained and gave no cause for dismissal – The Board held that the discharges occurred during an organizing campaign; there was a serious issue to be tried; a failure to reinstate the workers would irreparably harm the union; and the reinstatement would not harm the employer – Interim order granted

MARTIN BUILDING MAINTENANCE; RE LIUNA, LOCAL 1059.....(Jul./Aug.) 538

Interim Order – Discharge for Union Activity – Remedies – Unfair Labour Practice – A key inside organizer, a day cleaner in the housekeeping department, was dismissed by the employer for allegedly disclosing to a staff member confidential information discarded by another employee – There was no dispute that the inside organizer had never been formally disciplined and had received compliments regarding her work, three star ratings from her employer and was employee of the month – There was no dispute between the parties that the circumstances giving rise to the pending proceeding occurred during a campaign and there was a serious issue to be decided – The Board found that although there was another inside organizer, B was key, in that she had collected four times the number of cards as the other organizer and hence her removal would cause the union irreparable harm – Furthermore, the balance of harm favoured the union in that there was

little it could do to counter the loss of a key inside organizer, while there were safeguards the employer could put into place to guard against the possibility that B was disclosing information – Finally, the Board found an appearance of a causal connection between B's right to participate in union organizing and her termination: she had no formal discipline and had received commendations; five days after receiving information of her union activities the employer, after receiving some information alleging improper conduct by B, failed to investigate and did not put the allegations to B – Particulars of the alleged improper conduct were not put to B, nor were these provided in the letter of termination – Interim Reinstatement to same position ordered, with other declarations – Main application proceeds

FIVE BROTHERS HOSPITALITY PARTNERSHIP LIMITED C.O.B. HOLIDAY INN ST. CATHARINES; RE UNITE HERE ..... (Sept./Oct.) 633

Interim Relief – Consent to Prosecute – *Crown Employees Collective Bargaining Act* – Sale of Business – Successor Rights – Unfair Labour Practice – AMAPCEO, representing Crown employees working in the Office of Child and Family Service Advocacy, whose duties and responsibilities were being transferred to the Provincial Advocate for Children and Youth (PACY) pursuant to the *Provincial Advocate for Children and Youth Act, 2007*, applied for a declaration of successor rights under s. 10 of *CECBA* – The Board found there was a transfer of an undertaking: all the components of the predecessor OCFSA were conferred to the successor PACY; all former clients of OCFSA continued as clients of PACY; the same management, supervising and directing the same work force in the same place also continued – The only change was that the employees were no longer Crown employees, but reported to the Legislature – The Board found that PACY failed to meet the onus of establishing that the Legislative privilege it alleged existed was closely and directly connected with the fulfillment of the duties and responsibilities of the Legislature – Board declared PACY to be successor employer; Consent to Prosecute withdrawn, other applications adjourned

THE CROWN IN RIGHT OF ONTARIO AND PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH; RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO ..... (Sept./Oct.) 622

Interim Relief – Constitutional Law – Intervenor – Judicial Review – Reference – Unfair Labour Practice – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197.

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO ..... (Mar./Apr.) 314

Interim Relief – Construction Industry – Jurisdictional Dispute – Practice and Procedure – Strike – Local 793 sought an interim order that would return "flagman" work from Local 506 to its members pending the resolution of the main application – Ellis-Don, which is bound by collective agreements to Local 506, subcontracted work to Metric, which is bound by collective agreements to Local 793, but not Local 506 – Metric assigned the "flagman" work to Local 793 – Local 506 was effective in lobbying Ellis Don to change

the work assignment and give it to 506 – The Board found no basis for issuing an interim order simply because the general contractor responsible for the project decided to change the work assignment after one of the unions adversely affected by the initial assignment was effective in lobbying – On the declarations filed the Board did not find any direct evidence of a threat to engage in a strike, cause a strike or otherwise disrupt the work at the project – Absent the above evidence, and given an explicit and credible denial of any threat having been made, the Board found that an interim order would be inappropriate – Application dismissed; matter continues

METRIC CONTRACTING SERVICES CORPORATION; RE IUOE, LOCAL 793; RE LIUNA, LOCAL 506, ELLIS-DON CONSTRUCTION LTD.....(May/June) 428

Interim Relief – Discharge – Remedies – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 .....(Nov./Dec.) 760

Interim Relief – Trusteeship – Local 1256 filed complaints under section 147 and 149 and sought interim relief seeking to restrain the IU from directly or indirectly interfering with the assets, property, bargaining rights or duties of the Local – The IU had initiated proceedings under its Constitution which were a first step towards the imposition a supervision – The Board held that it was unable to evaluate the appropriate factors underlying the test for interim relief because the facts supporting the application were yet to mature – The Board refused to speculate on the IU's intentions or the foreseeability of supervision absent cogent evidence, whether present or historical, to support the inference that supervision was imminent – Without a demonstration of immediate harm that would accrue to Local 1256 on the surprise imposition of a supervision, the Board refused to offer interim relief because the Local could file a section 149 application which would allow Board to inquire into the cause for supervision – The threat that parties may resort to self-help remedies if the Board does not act is an inappropriate factor to consider in deciding whether to issue an order – Application for interim relief dismissed

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL 1256 .....(Jan./Feb.) 115

Intervenor – Constitutional Law – Interim Relief – Judicial Review – Reference – Unfair Labour Practice – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197.

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO ..... (Mar./Apr.) 314

Intervenor – Construction Industry Grievance – Parties – Practice and Procedure – Local 804 sought remedies against the contractor for violating the mobility provisions of the provincial agreement when it employed members of Local 353 to connect and install high voltage cables and transformers at a warehouse project in the geographic jurisdiction of Local 804 – Local 353 sought to intervene – The Board found that while the potential displacement of Local 353's members may not be enough to establish a legal interest in the proceeding, the interpretation of section 17 of the ICI portion of the Principal Agreement, by which Locals 353 and 1687 act as a "clearing house" for line work done in the province of Ontario, does create that legal interest – Objection (to Local 353 participating) dismissed – Matter continues

PBW HIGH VOLTAGE LTD.; RE IBEW, LOCAL 894; RE IBEW, LOCAL 353; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ..... (Mar./Apr.) 275

Judicial Review – Adjournment – Employment Standards – Natural Justice – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL ..... (Nov./Dec.) 863

Judicial Review – Bar – Bargaining Unit – Certification – The employer argued on judicial review that the Board must determine whether a bar existed pursuant to s. 10(3), prior to counting the votes – The court held the Board was interpreting its enabling statute; that it addressed labour relations principles in its reasons, including consequences of delay and possible prejudice to both sides; and that the Board was exercising its specialized expertise – The court did not agree that the issue was a threshold jurisdictional issue, but rather a procedural and administrative order, the type the court "should be loath to interfere along the way with" – Application dismissed

STOCK TRANSPORTATION LTD.; RE OLRB AND TEAMSTERS LOCAL UNION NO. 938 ..... (Jul./Aug.) 601

Judicial Review – Certification – Construction Industry – Mootness – Practice and Procedure – The Board certified the Painters' union in this card-based application when the employer

failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted ([2007] OLRB Rep. Mar/Apr 459) – Subsequent to the Divisional Court determining the Board had discretion to consider late-filed information pursuant to s. 128.1(3)), the Board reconsidered and revoked the certificate issued to the union and set the matter down for a Regional Certification meeting as it was unable to determine the number of employees in the bargaining unit – The Court of Appeal found these post-judicial review events rendered the matter before it moot, because the underlying controversy (whether the Board can consider and act on the information) had already been acted upon by the Board – The Court also decided not to exercise its discretion to decide the moot appeal on the merits because a) an adversarial context still existed; and b) while the issues (standard of review and interpretation of the s. 128.1) are important, they do not raise questions of broad social and constitutional importance, and they are not evasive of review – Finally the court cautioned that the decision was not an affirmation of Divisional Court's finding that the appropriate standard of review was correctness – The court made it clear that deference was owed to the Board on these types of issues – Appeal dismissed

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819 AND OLRB..... (Mar./Apr.) 306

Judicial Review – Certification – Construction Industry – Reconsideration – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB.....(Nov./Dec.) 859

Judicial Review – Certification – Construction Industry – Status – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted

that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB .....(Nov./Dec.) 858

Judicial Review – Certification – Representation Vote – Stay – A request for a stay of a Board decision ordering a vote count was dismissed in March 2008, with reasons to follow – The Court held that the first part of the test for a stay requires that the applicant establish there is a strong *prima facie* case that the Board's decision is unreasonable, rather than that there was a serious issue to be tried – The applicant failed to pass this test, as well as the other criteria (irreparable harm; balance of convenience) – Stay application dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.....(Jul./Aug.) 599

Judicial Review – Certification – Representation Vote – Stay – The employer sought a stay of the Board's decisions ordering a vote and a ballot count – Request for stay dismissed – Reasons to follow

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OLRB AND OPSEU.....(Mar./Apr.) 306

Judicial Review – Certification – Representation Vote – The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.....(Nov./Dec.) 865

Judicial Review – Constitutional Law – Interim Relief – Intervenor – Reference – Unfair Labour Practice – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197.

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO.....(Mar./Apr.) 314

Judicial Review – Construction Industry Grievance – The Board found that fire restoration work, performed by IBEW members, was regulated under the Provincial Agreement, rather than the GPMA, since the work was repair rather than maintenance – The Board also found that estoppel did not apply – At the request of the Union, the successful party,

the Board issued further reasons – A majority of the court found: the appropriate standard of review to be reasonableness; the Board had the jurisdiction to issue supplemental reasons; that those reasons, while still "far from the thorough and careful reasons that are generally issued by members of this Board," were adequate; that the Board did not incorrectly define the issues; and that the Board did not err in applying the doctrine of estoppel – The court made it clear that simply because the Board reached a different conclusion in the application of the doctrine of estoppel from the decision of another panel, this did not make the decision unreasonable – Its decision was within the range of reasonable outcomes, given the facts before it – Application for judicial review dismissed

JACOBS CATALYTIC LTD.; RE IBEW, LOCAL 353; THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, GENERAL PRESIDENTS' MAINTENANCE COMMITTEE FOR CANADA AND THE OLRB .....(May/June) 466

Judicial Review – Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – The court held that it is not the function of the Board, in determining a duty of fair representation complaint, to review the merits of an arbitration award or the procedural decisions that the arbitrator made – The Board had no jurisdiction to determine whether the Employer violated the collective agreement or other statutes governing the employment relationship – The decision not to allow the Board proceedings to be recorded is within the Board's discretion pursuant to s. 110(16) provided it gives full opportunity to the parties to present their evidence and to make submissions – The Board did not act improperly or offend the rules of procedural fairness when it refused to permit the reporter – The Board was reasonable in directing that the applicant seek leave of the Board prior to bringing another s. 74 complaint against the Union – The conclusion that the repeated allegations of s. 74 violations against the Union had become an abuse of process was reasonably made in an effort to control the Board's process – Application for Judicial Review dismissed

GUS NEDELKOPOULOS; OLRB; RE A.G.S. AUTOMOTIVE OSHAWA AND C.A.W. LOCAL 222 ..... (Mar./Apr.) 314

Judicial Review – Duty of Fair Representation – Practice and Procedure – Procedural Fairness – At the Board the complainant alleged that the union unfairly responded to her removal from the occasional teachers' list – She was removed from the list after refusing the school board's request to not disseminate her views (that there is a conspiracy involving the Catholic Church, the "Black Pope" and the Illuminati) in the classroom – An initial settlement was reached in which the union agreed to investigate whether a grievance could be filed and where the complainant agreed to an assessment from a psychiatrist – The complainant ultimately refused to cooperate, and the Board found the union had met its duty of fair representation – The court found that the Board's decision was reasonable as there was ample evidence to suggest the union's request for a psychiatric assessment was reasonable and that she had failed to cooperate with it – Additionally the Board's use of a "consultation" did not breach procedural fairness as s. 99 allows the Board to determine a matter without a hearing after "consulting with the parties" and the Board consulted meaningfully with both sides – Application dismissed

HOROCHOWSKI, DANA; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, YORK CATHOLIC DISTRICT SCHOOL BOARD, OLRB..... (Sept./Oct.) 742

Judicial Review – Duty of Fair Representation – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

GRANTLEY, HOWELL; RE UNITED STEELWORKERS OF AMERICA, LOCAL 7135; OLRB.....(Jan./Feb.) 121

Judicial Review – Employment Standards – Practice and Procedure – The Applicant sought judicial review of a Board decision upholding an Officer's refusal to issue an order to pay outstanding wages to him – The Board had found that the Applicant was not an employee at the relevant time – On judicial review, the Court held that the Board was correct not to postpone its own proceedings until the Applicant's Tax Court matter on Employment Insurance eligibility was resolved – Employment Insurance proceedings have different statutory schemes, purposes, parties, and available remedies, so their results are inapplicable to *Employment Standards Act* proceedings – Based on the evidence, the Board had reasonably decided that the Applicant was not an employee – Alternatively, the Board had found that no wages were owed to the Applicant, because the Applicant had already been paid substantially more than the minimum wage – Since the Applicant had led no evidence of his actual wage rate, the Board's reliance on the minimum wage was reasonable – The Applicant also complained that the Board's decision was libellous, in that it contained negative assessments of his credibility – The Divisional Court held that Vice-Chairs of the Board are protected from libel and slander claims – Application for judicial review dismissed

DR. OLIVER BAJOR; RE ARBITRAGE RESEARCH AND TRADING LTD., MINISTRY OF LABOUR AND OLRB .....(Jul./Aug.) 594

Judicial Review – Employment Standards – The Board refused the employer's request to extend the time for a review of an order to pay – Through solicitor's inadvertence the request was made six months after the receipt of the order to pay – The court found that the appropriate standard of review for the Board's discretionary decision was reasonableness – In making its decision the Board looked at the purposes of the Act and presumptive prejudice, but did not assess the merits of the claim – The court noted there was no consistent authority at the Board that the merits of the claim should be considered, and in any event the court assessed the applicant's claim that the ESO was wrong, and found it open to interpretation – The court found the Board's decision reasonable – Application dismissed

SOLID GOLD INN, 848347 ONTARIO LIMITED O/A; RE CHRISTINE LOWE, MOL AND OLRB ..... (Sept./Oct.) 745

Jurisdictional Dispute – Construction Industry – Interim Relief – Practice and Procedure – Strike – Local 793 sought an interim order that would return "flagman" work from Local 506 to its members pending the resolution of the main application – Ellis-Don, which is bound by collective agreements to Local 506, subcontracted work to Metric, which is bound by collective agreements to Local 793, but not Local 506 – Metric assigned the "flagman" work to Local 793 – Local 506 was effective in lobbying Ellis Don to change the work assignment and give it to 506 – The Board found no basis for issuing an interim order simply because the general contractor responsible for the project decided to change the work assignment after one of the unions adversely affected by the initial assignment was effective in lobbying – On the declarations filed the Board did not find any direct evidence of a threat to engage in a strike, cause a strike or otherwise disrupt the work at

the project – Absent the above evidence, and given an explicit and credible denial of any threat having been made, the Board found that an interim order would be inappropriate – Application dismissed; matter continues

METRIC CONTRACTING SERVICES CORPORATION; RE IUOE, LOCAL 793; RE LIUNA, LOCAL 506, ELLIS-DON CONSTRUCTION LTD.....(May/June) 428

Jurisdictional Dispute – The employer sought a declaration that its reassignment of two team leader shifts performed by RNs covered by ONA, to RPNs, covered by CUPE, was appropriate – ONA argued that the reassignment constituted a lay-off of two full time members, contrary to the work protection clause in the collective agreement – No competing claim for jurisdiction arose from the CUPE collective agreement – The employer argued that the collective agreement only protected work done exclusively by the RNs and that since both the RNs and the RPNs acted as team leaders and performed the same functions, a claim for exclusivity could not be made out – The decision turned entirely upon the proper interpretation of the ONA collective agreement – The Board held that while the reassignment gave rise to a jurisdictional dispute in the formal sense, it was inappropriate for the Board to exercise its jurisdiction to confirm the reassignment as it would relieve the employer of its contractual obligation with ONA – The employer was directed to cease assigning team leader work to employees not covered by the terms of ONA's collective agreement.

ONTARIO NURSES' ASSOCIATION; RE GLEBE CENTRE INCORPORATED; RE CUPE AND ITS LOCAL 3302 ..... (Mar./Apr.) 266

Mediation – Practice and Procedure – Summons – Superior Court of Justice (Small Claims Court) – The Board brought a motion to quash a summons issued to a Labour Relations Officer to testify in a civil proceeding – The Court found that s. 117 was clear on its face—without the Board's consent the officer can not be made to testify regarding things done or not done in the course of their employment – The Board had refused to grant its consent and that decision (*infra*, p.55) was before the Court – Motion granted

WOODCOCK, JEREMY WILLIAM; RE RONALD GOODCHILD.....(Jan./Feb.) 121

Mediation – Practice and Procedure – Summons – The Board received a request to permit a Labour Relations Officer to testify in a civil proceeding (see court ruling under Court Proceedings below) about matters respecting information obtained in the discharge of her duties – The Board reviewed the case law and policy underlying section 117, which requires the consent of the Board before an officer may testify in a civil proceeding, and decided there were no grounds for exercising its discretion to allow the Officer to testify – Consent not granted

JEREMY WOODCOCK; RE UNITED STEELWORKERS OF AMERICA LOCAL 6571; RE GERDAU AMERISTEEL INC. .....(Jan./Feb.) 55

Membership Evidence – Bar – Certification – Voluntary Recognition – CUPW asked the Board to find that the voluntary recognition agreement between the UWU and the employer was not a bar to the certification – The Board found there was a different and less stringent evidentiary burden to establish representational entitlement pursuant to section 66 than in furtherance of an application for certification – The Board found that neither the fact that the union registration cards were filled in and signed prior to knowledge of who the employer was to be, nor the fact that the employer's name was added to the registration cards once it became known, rendered the membership evidence invalid or

improper – The voluntary recognition agreement entered into by the Employer and the UWU was upheld – Application for Certification dismissed

DISTINCTION SERVICE PLUS INC.; RE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Jan./Feb.) 15

Mootness – Certification – Construction Industry – Judicial Review – Practice and Procedure – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted ([2007] OLRB Rep. Mar/Apr 459) – Subsequent to the Divisional Court determining the Board had discretion to consider late-filed information pursuant to s. 128.1(3)), the Board reconsidered and revoked the certificate issued to the union and set the matter down for a Regional Certification meeting as it was unable to determine the number of employees in the bargaining unit – The Court of Appeal found these post-judicial review events rendered the matter before it moot, because the underlying controversy (whether the Board can consider and act on the information) had already been acted upon by the Board – The Court also decided not to exercise its discretion to decide the moot appeal on the merits because a) an adversarial context still existed; and b) while the issues (standard of review and interpretation of the s. 128.1) are important, they do not raise questions of broad social and constitutional importance, and they are not evasive of review – Finally the court cautioned that the decision was not an affirmation of Divisional Court's finding that the appropriate standard of review was correctness – The court made it clear that deference was owed to the Board on these types of issues – Appeal dismissed

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819 AND OLRB ..... (Mar./Apr.) 306

Natural Justice – Adjournment – Employment Standards – Judicial Review – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL ..... (Nov./Dec.) 863

Occupational Health and Safety Act – Construction Industry Grievance – The union grieved the failure of the responding party to pay employees for specific training in asbestos removal required by a Regulation under the *Occupational Health and Safety Act* – The Board found that the employer had arranged for the training and had directed the employees to attend the three-day course – Pursuant to the provisions of the Regulation as well as the

collective agreement, the responding party was responsible for compensating its employees who attended the training – Owners are equally responsible as employers for compliance with the Regulation – Grievance allowed

HIGH POINT ENVIRONMENTAL INC./HPE ENVIRONMENTAL INC.; RE LIUNA, LOCAL 506 .....(Jul./Aug.) 521

Order for Production – Practice and Procedure – Reconsideration – The City sought reconsideration of the Board's decision denying its request for production of certain documents on basis of solicitor-client privilege – The City put the newly-established union to strict proof of union status, requesting drafts and documents relating to the preparation of Minutes from the trade union's founding meeting – The Board held that privilege extends to statements made by a client in furtherance of procuring legal advice – The onus lies on the party requesting disclosure to satisfy the decision-maker that the documents sought are not privileged, based on evidence external to the documents sought – The Board refused to review the documents for which privilege was asserted to discover whether privilege attached – Request for reconsideration denied

CORPORATION OF THE CITY OF WINDSOR; RE CCW-PETU CORPORATION OF THE CITY OF WINDSOR-PROFESSIONAL EMPLOYEES TRADE UNION .....(Jan./Feb.) 9

Parties – Construction Industry – Termination – Timeliness – The applicant sought to terminate the bargaining rights of LIUNA Local 607 – There was no dispute that the bargaining rights were held by LIUNA, Ontario Provincial District Council – The Board found that the OPDC must have been certified on the basis of the employees' membership in Local 607, since employees can only be members of locals, and not of the council – Local 607 conducted bargaining, drafted collective agreements, and made the application for the appointment of the conciliator – The Board held that given that the OPDC and Local 607 could agree on the transfer of bargaining rights, and given such a widespread practice once a certificate had been issued, it was not unreasonable for the applicant to assume that Local 607 was his bargaining agent – The style of cause was amended to include both Local 607 and the OPDC – On the issue of the timeliness of the application, the Board held that when the application was filed on the same day as a conciliation officer was appointed, the application was timely – Submissions ordered on status issues – Matter continues

A-1 SUPERIOR PAVING AND CONCRETE WORKS COMPANY INC.; RE DANIEL WILSON; RE LIUNA – CONSTRUCTION AND ALLIED WORKERS, LOCAL 607, AND LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .....(Jul./Aug.) 485

Parties – Construction Industry Grievance – Intervenor – Practice and Procedure – Local 804 sought remedies against the contractor for violating the mobility provisions of the provincial agreement when it employed members of Local 353 to connect and install high voltage cables and transformers at a warehouse project in the geographic jurisdiction of Local 804 – Local 353 sought to intervene – The Board found that while the potential displacement of Local 353's members may not be enough to establish a legal interest in the proceeding, the interpretation of section 17 of the ICI portion of the Principal Agreement, by which Locals 353 and 1687 act as a "clearing house" for line work done in the province of Ontario, does create that legal interest – Objection (to Local 353 participating) dismissed – Matter continues

PBW HIGH VOLTAGE LTD.; RE IBEW, LOCAL 894; RE IBEW, LOCAL 353; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ..... (Mar./Apr.) 275

Practice and Procedure – *Crown Employees Collective Bargaining Act* – Unfair Labour Practice – Witness – The matter involves events that occurred over twenty-five years ago that only came to light recently – The parties asked the Board to first determine whether it had the jurisdiction to hear a complaint that sections of the old CECBA had been breached (assuming the allegations made out a case, the complaint was timely, and the Board would grant a remedy) – Relying on the *Legislation Act*, the Board found that the complainants' rights came into existence under old CECBA, and its repeal did not affect those rights; new-CECBA repealed the old, such that new-CECBA proceedings were to be followed; and no contrary intention appeared – The Board also noted that rights must be vindicated in some forum and a purposeful analysis leads to the conclusion that the Board's specialized expertise is more appropriate, in these circumstances, than the courts – Accordingly, the Board has the jurisdiction to hear the complaint – Matter continues

GOVERNMENT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES; RE OPSEU, ROBERT GORDON, MICHAEL MCKINNON, WILLIAM BRADLEY, ROBERT MOREAU, JOE D'ANDREA AND STEPHEN LONSDALE ..... (May/June) 395

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Trade Union – After the parent trade union (UBC) assumed supervision over the Local, the Local brought an application to the Board under s. 147 and 149 – Two matters were at issue: the Local's refusal to provide data in a digital format to UBC (ULTRA issue) and the fact that persons were permitted by the Local to work in its area without becoming, or being permitted to become, members of the Local ("permit workers" issue) – The Board noted the underlying tension between UBC and the Local since UBC had reduced the number of locals and required them to join together into two regional councils – Although the parties settled the Ultra issue, the Board noted that the lack of forthrightness on the part of the Local and the lengthy delay in putting forward any sort of explanation was inappropriate – The Board found that the Local failed in its obligation to provide full disclosure to UBC of an issue in which it had a legitimate interest and a right to be informed – Such a refusal gave UBC just cause to restrict the autonomy of the Local by way of supervision but not to the extent of the one that was imposed – The Board made a more limited order addressing the production of information about permit workers from the Local to UBC – Declaration made

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL UNION 1256; RE ARNOLD BONGERS ET AL, AS THE TRUSTEES OF THE CARPENTERS' LOCAL 1256 PENSION PLAN, THE CARPENTERS' LOCAL 1256 VACATION PAY PLAN AND THE CARPENTERS' LOCAL 1256 WELFARE PLAN ..... (Sept./Oct.) 715

Practice and Procedure – Bargaining Unit – Certification – Construction Industry – Status – Unfair Labour Practice – The Board issued a number of preliminary and procedural rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees

provided by the responding party at the regional certification meeting because of the prejudice the applicants would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

CLEAN WATER WORKS INC.; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 171

Practice and Procedure – Bargaining Unit – Certification – Union applied for an all employee unit where the employer had two operations: a nursing home and retirement home – Employer argued that only a two bargaining unit structure was appropriate – After the ballots were counted, a majority of employees in the nursing home voted in the union's favour, while the employees in the retirement home and all employee unit were against the union – The parties then adopted each others' positions – The Board permitted the change of positions, following *Martha's Garden* and *Morrow Transport* and noted that change of position cases are rare and are a natural outcome of the Board's processes which are designed to ensure that certification cases get dealt with quickly, effectively and without the requirement of unnecessary litigation – Finally, the Board found that a two-unit structure was appropriate (particularly given that the employer had argued, albeit at different times, that both an all employee and a two unit structure were appropriate) – Application granted, in part

NUTRA SERVICES INC.; RE SEIU LOCAL 1 CANADA ..... (Jul./Aug.) 550

Practice and Procedure – Certification – Construction Industry – Timeliness – The IUOE asked the Board to refuse to consider the response to its application for certification since the respondent had failed to file within the time limits set out by the Act and the Board's Rules of Procedure – The applicant had contemporaneously filed an industrial application and a construction application for certification – The Board reviewed its jurisprudence on the exercise of its discretion – In the instant case, the Board held that the respondent's error in believing there to be only one application for certification was reasonable in the circumstances – The Board found that the IOUE contributed to the respondent's confusion by simultaneously delivering multiple applications, each with a cover letter on the same letterhead with the same solicitor's file number on it – The Board held that applicant could have alerted the respondent to fact that there were two applications – The Board exercised its discretion and considered the information contained in the late-filed response – Matter continues

CARMAN CONSTRUCTION INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Jan./Feb.) 1

Practice and Procedure – Certification – Construction Industry – Judicial Review – Mootness – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted ([2007] OLRB Rep. Mar/Apr 459) – Subsequent to the Divisional Court determining the Board had discretion to consider late-filed information pursuant to s. 128.1(3)), the Board reconsidered and

revoked the certificate issued to the union and set the matter down for a Regional Certification meeting as it was unable to determine the number of employees in the bargaining unit – The Court of Appeal found these post-judicial review events rendered the matter before it moot, because the underlying controversy (whether the Board can consider and act on the information) had already been acted upon by the Board – The Court also decided not to exercise its discretion to decide the moot appeal on the merits because a) an adversarial context still existed; and b) while the issues (standard of review and interpretation of the s. 128.1) are important, they do not raise questions of broad social and constitutional importance, and they are not evasive of review – Finally the court cautioned that the decision was not an affirmation of Divisional Court's finding that the appropriate standard of review was correctness – The court made it clear that deference was owed to the Board on these types of issues – Appeal dismissed

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819 AND OLRB.....(Mar./Apr.) 306

Practice and Procedure – Certification – Construction Industry – The Sheet Metal Workers International Association (SMWIA) sought to displace the Carpenters performing roofing or siding work in the low rise portion of the residential sector – The Carpenters argued that the applications should be dismissed because the SMWIA Constitution prohibited persons compensated on a lump sum or piecework basis from being members of that union – The Board found that SMWIA had adopted the Carpenters' existing terms and conditions for residential roofers and siders, such that the workers fit into the exemption for pieceworkers and were not prohibited from membership – The responding parties argued that the individuals the SMWIA sought to represent were employers themselves, and not employees – The Board found that the nature of the relationship between pieceworkers and their helpers, on the one hand, and the responding parties, on the other, had evolved over time so the companies' argument that they had no employees could not be sustained – The Board also held that it was impossible, at this stage in the proceedings, to determine whether an individual working as a pieceworker or helper on a company's job site was employed by that company or by some other employer (or perhaps was an employer himself) – Finally, the Board refused to vary the *Gilvesy* test for voter eligibility in certification applications in the construction industry, given that the decisions ordering votes had clearly identified those eligible as "individuals who were employed by Eastern Eavestroughing" on a specific date – Since there was a potential for more than six hundred status disputes in these applications, the Board issued directions for the filing of book-in sheets and other documentary evidence which would assist in indicating who may have been at work on the date of application – Matters continue

EASTERN EAVESTROUGHING LTD.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA.....(May/June) 368

Practice and Procedure – Certification – Construction Industry – Remedial Certification – The union filed an application for certification with less than 40% membership and applied for remedial certification under s. 11 – In its application the applicant failed to identify which certification regime (s. 8 or 128.1) it was choosing – The responding party argued this was fatal – The Board found, based on statements made elsewhere in the application that the applicant had elected to proceed under s. 8 – Additionally, the Board noted that s. 128.1 specifically requires an election and since the applicant had not elected s. 128.1, the application must be dealt with under s. 8 – Matter continues

ASHBRIDGE ELECTRIC CONTRACTORS LIMITED; RE IBEW, LOCAL 353 .....(Jul./Aug.) 489

Practice and Procedure – Certification – Construction Industry – Representation Vote – Status – In light of a s. 8.1 challenge as well as status disputes in two certification applications filed by different unions involving the same employer, the Board ordered that the ballots cast in the representation vote be segregated and the ballot box sealed – Unfortunately, the ballots were not segregated – The Board ordered a second representation vote but ruled that only those individuals who cast ballots in the first vote should be eligible to cast ballots in the second vote – Second vote ordered; submissions directed

CLEAN WATER WORKS INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Sept./Oct.) 617

Practice and Procedure – Certification – Construction Industry – The Board considers whether it can and should accept a late-filed response to an application for certification – Corporate counsel for the responding party wrote to the Board on the due date, asking for an extension so that a labour lawyer could be consulted; the response was filed one day late – The Board analyzes the impact of the Court of Appeal's decision in *Maystar* [2008] OLRB Rep. March/April 306 and holds that because of the concluding paragraphs of that decision, the Divisional Court's ruling on the interpretation of s. 128.1(3) is not binding on the Board – The Board holds, however, that the Divisional Court's interpretation of the impugned section is persuasive: the word "shall" in s. 128.1(3) is directed at the employer, not the Board, and it should be interpreted in a directory and not a mandatory manner – A mandatory approach would lead to unfair results, and would require the Board to treat the various aspects of a late-filed response differently – Accordingly, the Board finds it does have the discretion to consider late-filed information under s. 128.1(3) – In exercising its discretion to accept the delayed response, the Board considers the length of the delay; how compelling the responding party's explanation of its delay is; and the prejudice to the applicant – The Board allows the late-filed response and refers the matter to a regional certification meeting

CHRISTINA HOMES LTD. AND/OR 1357202 ONTARIO LTD. AND/OR CHRISTINA WEST JOINT VENTURE; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Nov./Dec.) 749

Practice and Procedure – Certification – Construction Industry – Evidence – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 .....(Nov./Dec.) 803

Practice and Procedure – Certification – Construction Industry – The applicant, applying for certification with membership cards for Local 249, mistakenly named the Carpenters' Union, Central Ontario Regional Council (in which Local 249 is not a constituent member), instead of the Carpenters District Council of Ontario, as applicant – The Board, relying on s. 112, permitted the applicant to amend its name because: the change was not a substantive one; it was a *bona fide* mistake which created no advantage for the applicant nor any prejudice to the respondent; and the mistake did not affect the integrity of the membership evidence – Motion to amend allowed, matter continues

JENSEN BUILDING LTD.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO; UBCJA.....(Nov./Dec.) 812

Practice and Procedure – Certification – Construction Industry – The Board provides reasons for the acceptance a late-filed response to an application for certification – The applicant filed two very similar applications for certification with the responding party in close proximity; the responding party asserted that it did not receive the first application, and thought the hard copy material it received was a re-sending of the first application, when in fact it was a second application; nothing on the face of the new material identified for the responding party that this was a fresh application – The Board surveys its own case law, beginning with *Air Kool*, gives consideration to the court decisions in *Maystar*, and surveys other court rulings on the interpretation of "shall" – The Board concludes it is not bound by the Divisional Court's decision in *Maystar* because the Court of Appeal explicitly invited the Board to reconcile its jurisprudence – In considering whether it has the discretion to accept a late-filed response, the Board finds that an interpretation of the word 'shall' as directory in nature: (1) is consistent with and best ensures the attainment of the purposes of the Act; (2) eliminates the unintended consequences that result from concluding that the word is mandatory; (3) is consistent with establishing a common meaning for both the English and French texts of the Act; and (4) is consistent with the principles of natural justice – The Board finds that the responding party committed an innocent error in not recognizing that the applicant had filed two applications for certification, and the responding party acted promptly in rectifying the error once it learned of the true situation – Late response allowed

WEATHERTECH RESTORATION SERVICES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 832

Practice and Procedure – Certification – Representation Vote – The bargaining unit proposed by the union in its application for certification lacked any geographic scope clause – A majority of the Board found that s. 8(2) directs that a representation vote be taken where there is an appearance of 40% membership in the bargaining unit proposed by the union – A majority of the Board determined that a representation vote must occur and that the ballot box would be sealed – The appropriateness of the bargaining unit would be dealt with as part of the s. 8.1 notice – Vote ordered

WESTERN TORONTO INTERNATIONAL TRUCKS INC.; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ..... (Sept./Oct.) 739

Practice and Procedure – Conflict of Interest – The Board noted that there has been an increase in the frequency of motions to remove counsel of record from particular applications due to alleged conflicts of interest – The Board held that such allegations are serious

challenges to a lawyer's professionalism and should not be treated casually – Assuming a role analogous to the Superior Court in similar circumstances, the Board in the instant case issued a direction and schedule for the exchange and delivery of declarations as to the facts (and supporting documents) on which the parties rely in the motion – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC.; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (November 5, 2008) .....(Nov./Dec.) 781

Practice and Procedure – Construction Industry – Conflict of Interest – Related Employer – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008).....(Nov./Dec.) 785

Practice and Procedure – Construction Industry – Evidence – Related Employer – Sale of Business – Union sought to have admitted thirty year old documents as "business records," specifically a letter commenting on the binding nature of a collective agreement – The employer objected arguing that it was caught in an impossible position as it must find the author or another witness to give evidence about documents that apparently created some 30 years ago have played no role in the corporation's existence since that time – The Board found the records were not admissible pursuant to s. 35(2) of the *Evidence Act*, in that the record did not meet any of the conditions set out in the subsection – The Board also found that even if s. 111(2)(c) of the *LRA, 1995* created a wider scope than s. 35, it would not admit the record because the documents are expressions of opinion by parties whose source of information and belief cannot be ascertained, and therefore no weight could be placed on them – Additionally, the Board applied the rule in *Browne v. Dunn* and did not admit evidence that contradicted earlier testimony by a witness where the contradiction was not put to the witness during cross examination – Matter continues

CADILLAC FAIRVIEW COROPORATION LTD., THE, CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS

INC. AND REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795 .....(Jul./Aug.) 491

Practice and Procedure – Construction Industry – Interim Relief – Jurisdictional Dispute – Strike – Local 793 sought an interim order that would return "flagman" work from Local 506 to its members pending the resolution of the main application – Ellis-Don, which is bound by collective agreements to Local 506, subcontracted work to Metric, which is bound by collective agreements to Local 793, but not Local 506 – Metric assigned the "flagman" work to Local 793 – Local 506 was effective in lobbying Ellis Don to change the work assignment and give it to 506 – The Board found no basis for issuing an interim order simply because the general contractor responsible for the project decided to change the work assignment after one of the unions adversely affected by the initial assignment was effective in lobbying – On the declarations filed the Board did not find any direct evidence of a threat to engage in a strike, cause a strike or otherwise disrupt the work at the project – Absent the above evidence, and given an explicit and credible denial of any threat having been made, the Board found that an interim order would be inappropriate – Application dismissed; matter continues

METRIC CONTRACTING SERVICES CORPORATION; RE IUOE, LOCAL 793; RE LIUNA, LOCAL 506, ELLIS-DON CONSTRUCTION LTD.....(May/June) 428

Practice and Procedure – Construction Industry Grievance – Intervenor – Parties – Local 804 sought remedies against the contractor for violating the mobility provisions of the provincial agreement when it employed members of Local 353 to connect and install high voltage cables and transformers at a warehouse project in the geographic jurisdiction of Local 804 – Local 353 sought to intervene – The Board found that while the potential displacement of Local 353's members may not be enough to establish a legal interest in the proceeding, the interpretation of section 17 of the ICI portion of the Principal Agreement, by which Locals 353 and 1687 act as a "clearing house" for line work done in the province of Ontario, does create that legal interest – Objection (to Local 353 participating) dismissed – Matter continues

PBW HIGH VOLTAGE LTD.; RE IBEW, LOCAL 894; RE IBEW, LOCAL 353; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO..... (Mar./Apr.) 275

Practice and Procedure – Construction Industry Grievance – Reconsideration – The applicant sought reconsideration of the Board's determination to award it only $2,500 in costs rather than the full indemnity of $6,000 that it had requested – The Board held that costs on a "solicitor-and-client" basis do not entitle a party to *carte blanche* repayment of all its expenses – The Board's practice was that it would consider the reasonableness of the costs being sought; this was the first instance where an applicant's costs had been seriously challenged by a responding party – The applicant failed to provide the Board with any justification for the amount claimed – Reconsideration request denied

MAN-SHIELD (ONT.) CONSTRUCTION INC. A.K.A. MAN-SHIELD (NWO) CONSTRUCTION INC.; RE CJA, LOCAL 93 ET AL .....(Jan./Feb.) 72

Practice and Procedure – Construction Industry Grievance – Reconsideration – Settlement – The applicant sought reconsideration of a default award because the parties failed to advise the Board of a settlement they had reached prior to the issuance of the default decision – The applicant had originally sought a default decision if the responding party did not file an Intent to Defend, and no such filing occurred – The Board reconsidered its

decision but admonished the parties for failing to advise the Board of their settlement, causing the Board to expend time and resources to review a file and issue an unnecessary decision – Reconsideration granted; application withdrawn

NORTH ROCK GROUP LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .....(Jul./Aug.) 548

Practice and Procedure – Construction Industry Grievance – The applicant failed to file and deliver its grievance referral to the responding party in accordance with s. 133 and Rule 34.2 [due to inadvertence in the solicitor's office, it was filed with the Board before being delivered to the employer] – The Board found it had the discretion under s. 133(4) to accept the referral, and, in these circumstances, did so, while also extending the time for the employer to respond – Grievance continues

VISTA SUDBURY HOTEL; RE LIUNA, LOCAL 493 .....(Jul./Aug.) 591

Practice and Procedure – Contempt – Remedies – In the context of this sale of business application, the Board ruled, in an earlier decision, that counsel for the union had breached a Confidentiality Order and an implied undertaking of confidentiality with respect to certain documents produced in the proceeding – The Board addressed the issue of relief available to the employer – The Board found that counsel for the union had aggressively denied having committed the breach for several months, then eventually admitted to it, apologized and claimed inadvertence – The Board determined that the issue of relief was a procedural matter and could be decided on the basis of written submissions – The Board issued a number of orders and declarations, including: (a) that both the union and its counsel breached the implied undertaking and the Confidentiality Order in several ways; (b) that the union and its counsel improperly reproduced the contents of the confidential document in question and improperly used information contained therein for their own purposes (the Board found that the confidentiality applied to both the union and the law firm and that the law firm was acting on behalf of the union) (c) that employer's counsel acted appropriately throughout the proceedings and there was no basis for allegations of inappropriate or unprofessional conduct complained of by union counsel; (d) that the Confidentiality Order is permanent until the Board directs otherwise, subject to the caveat that the Order does not apply to documents that are otherwise available and were obtained other than through the production order in question; (e) that the law firm ensure that individual counsel do not communicate any information or disclose any documents obtained, or to be obtained, through production in the instant proceeding to anyone in the firm who is not engaged in the instant proceeding or its corollaries; that counsel for the union advise the employer and its counsel of the steps taken to satisfy the obligations under the preceding directions – The Board declined to order that union counsel pay the employer's and its counsel's legal and other expenses incurred as a direct result of the vehement denial of wrongdoing, stating it did not have the jurisdiction to award such costs – The Board also refused to state a case to the Divisional Court asking the Court to inquire into the breach of the implied undertaking and the contempt of the Confidentiality Order, stating that the exercise of such discretion would not sufficiently further labour relations purposes since the underlying purpose of the request was to secure costs – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC., NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA, EAGLE LOGGING INC., BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC.; RE UNITED STEELWORKERS, LOCAL 1-2693; RE KOSKIE MINSKY LLP ..(May/June) 402

Practice and Procedure – Duty of Fair Representation – Judicial Review – Unfair Labour Practice – The court held that it is not the function of the Board, in determining a duty of fair representation complaint, to review the merits of an arbitration award or the procedural decisions that the arbitrator made – The Board had no jurisdiction to determine whether the Employer violated the collective agreement or other statutes governing the employment relationship – The decision not to allow the Board proceedings to be recorded is within the Board's discretion pursuant to s. 110(16) provided it gives full opportunity to the parties to present their evidence and to make submissions – The Board did not act improperly or offend the rules of procedural fairness when it refused to permit the reporter – The Board was reasonable in directing that the applicant seek leave of the Board prior to bringing another s. 74 complaint against the Union – The conclusion that the repeated allegations of s. 74 violations against the Union had become an abuse of process was reasonably made in an effort to control the Board's process – Application for Judicial Review dismissed

GUS NEDELKOPOULOS; OLRB; RE A.G.S. AUTOMOTIVE OSHAWA AND C.A.W. LOCAL 222 ..... (Mar./Apr.) 314

Practice and Procedure – Duty of Fair Representation – Judicial Review - Procedural Fairness – At the Board the complainant alleged that the union unfairly responded to her removal from the occasional teachers' list – She was removed from the list after refusing the school board's request to not disseminate her views (that there is a conspiracy involving the Catholic Church, the "Black Pope" and the Illuminati) in the classroom – An initial settlement was reached in which the union agreed to investigate whether a grievance could be filed and where the complainant agreed to an assessment from a psychiatrist – The complainant ultimately refused to cooperate, and the Board found the union had met its duty of fair representation – The court found that the Board's decision was reasonable as there was ample evidence to suggest the union's request for a psychiatric assessment was reasonable and that she had failed to cooperate with it – Additionally the Board's use of a "consultation" did not breach procedural fairness as s. 99 allows the Board to determine a matter without a hearing after "consulting with the parties" and the Board consulted meaningfully with both sides – Application dismissed

HOROCHOWSKI, DANA; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, YORK CATHOLIC DISTRICT SCHOOL BOARD, OLRB ..... (Sept./Oct.) 742

Practice and Procedure – Duty of Fair Representation – The Board was asked for an Order to remove an agent as representative of the complainants – The Board found the representative was providing legal services in contravention of the *Law Society Act* (he was not licensed, nor exempted from the requirements) – The Board found it had the authority to make the order requested pursuant to its procedural powers and s. 23 of the *SPPA* – The Board noted parties' desires to be represented by the individual of their choice, however this must now be considered in light of the recently enacted paralegal licensing requirements which have changed the landscape – Although the Board recognized there may be circumstances where it might permit such a representative to continue, this case, which had been freshly filed, was not one of them – Representative removed as agent for complainant

NANCY GULYAS, SYLVIA JOHNSON et al; RE OPSEU AND ITS LOCAL 380; RE MUSKOKA ALGONQUIN HEALTHCARE ..... (May/June) 436

Practice and Procedure – Duty of Fair Representation – The Board was asked to order that an agent not be permitted to represent a party before the Board – The Board found that the agent did not meet the recently enacted paralegal licensing requirements, nor did he meet any of the exemptions set out in the Law Society's By-laws – The Board found that it could exercise its discretion to make an order under its procedural powers and s. 23 of the *SPPA* – The Board removed the agent as representative of record in the case before it, but decided at this time not to make a blanket order – The Board did note that continued appearances by an unauthorized individual in new proceedings before the Board or a failure by the individual to arrange the orderly transfer of existing files to authorized representatives might lead the Board to consider a broader order – Representative removed as agent for complainant

TRACIE JONES; RE OPSEU; RE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES.....(May/June) 459

Practice and Procedure – Employment Standards – Judicial Review – The Applicant sought judicial review of a Board decision upholding an Officer's refusal to issue an order to pay outstanding wages to him – The Board had found that the Applicant was not an employee at the relevant time – On judicial review, the Court held that the Board was correct not to postpone its own proceedings until the Applicant's Tax Court matter on Employment Insurance eligibility was resolved – Employment Insurance proceedings have different statutory schemes, purposes, parties, and available remedies, so their results are inapplicable to *Employment Standards Act* proceedings – Based on the evidence, the Board had reasonably decided that the Applicant was not an employee – Alternatively, the Board had found that no wages were owed to the Applicant, because the Applicant had already been paid substantially more than the minimum wage – Since the Applicant had led no evidence of his actual wage rate, the Board's reliance on the minimum wage was reasonable – The Applicant also complained that the Board's decision was libellous, in that it contained negative assessments of his credibility – The Divisional Court held that Vice-Chairs of the Board are protected from libel and slander claims – Application for judicial review dismissed

DR. OLIVER BAJOR; RE ARBITRAGE RESEARCH AND TRADING LTD., MINISTRY OF LABOUR AND OLRB .....(Jul./Aug.) 594

Practice and Procedure – Employment Standards – Settlement – Almost four years after the settlement of this application for review, the employer sought the Board's permission to compel a labour relations officer to testify on its behalf in a wrongful dismissal suit filed by the employee – The employee's assertion in the civil suit was that she could not read English at the time she entered into the settlement; the employer wanted the officer to give evidence about the employee's language abilities and describe the nature of her discussions with the employee – The Board reiterated its long held view regarding the importance of maintaining confidentiality in the mediation process - In addition, in the Board's view, there were other ways in which the employer could ascertain the employee's proficiency in the language; the labour relations officer could not be an expert on this aspect of the case – Request denied

OCTOBER ENTERPRISES INCORPORATED; RE RASHIDA (SHEILA) KARMALI AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sept./Oct.) 667

Practice and Procedure – *Environmental Protection Act* – Reprisal – Timeliness – The employer argued that this reprisal application should be dismissed because it is precluded by the doctrines of issue estoppel and abuse of process, in addition to being untimely –

The Board found that an arbitration panel in a grievance proceeding had fully considered the issues raised by the applicant in this reprisal complaint, even when the union had withdrawn the reprisal component of the grievance during final argument before the arbitration board – The Board also found that the application was untimely; rather than filing immediately after the impugned conduct, the applicant waited until the decision of the arbitration board to make his claim – Application dismissed

CITY OF OTTAWA; RE TED COOPER .....(Jul./Aug.) 507

Practice and Procedure – Health and Safety – Timeliness – After the inspector reviewed the applicant's complaint at the workplace, the applicant was advised there was no contravention of the Act – The inspector did not issue an Order – The inspector returned to the workplace three days later and provided the employer with a Field Visit report, but did not provide the complainant with the report – There is no provision in the Act requiring the inspector to confirm in writing the refusal to issue an order, nor requiring the inspector to provide the complainant with the Field Visit report until it is asked for – The applicant appealed to the Board within 30 days of having received the Field Visit report, but beyond the 30 days of the Inspector's decision not to issue an order – The Board found the appeal untimely – Appeal dismissed

CASTONGUAY BLASTING GP AND CLAUDE NADON, INSPECTOR; RE STEVEN MROCZYNSKI.....(Jul./Aug.) 504

Practice and Procedure – Mediation – Summons – Superior Court of Justice (Small Claims Court) – The Board brought a motion to quash a summons issued to a Labour Relations Officer to testify in a civil proceeding – The Court found that s. 117 was clear on its face—without the Board's consent the officer can not be made to testify regarding things done or not done in the course of their employment – The Board had refused to grant its consent and that decision (*infra*, p.55) was before the Court – Motion granted

WOODCOCK, JEREMY WILLIAM; RE RONALD GOODCHILD.....(Jan./Feb.) 121

Practice and Procedure – Mediation – Summons – The Board received a request to permit a Labour Relations Officer to testify in a civil proceeding (see court ruling under Court Proceedings below) about matters respecting information obtained in the discharge of her duties – The Board reviewed the case law and policy underlying section 117, which requires the consent of the Board before an officer may testify in a civil proceeding, and decided there were no grounds for exercising its discretion to allow the Officer to testify – Consent not granted

JEREMY WOODCOCK; RE UNITED STEELWORKERS OF AMERICA LOCAL 6571; RE GERDAU AMERISTEEL INC. .....(Jan./Feb.) 55

Practice and Procedure – Ratification and Strike Vote – Strike – The union, acting in error (not in bad faith) advised ten employees that they must sign union cards to be eligible to vote for strike action – The Board found as a fact that there were 53 employees in the bargaining unit, 43 of whom voted with 28 voting in favour of strike action – The Board noted that a clear majority of employees voted in favour of strike action, and that while the union may have breached its obligations under s. 79 for the conduct of strike votes and while some remedy might lie against the union for this conduct, there was no challenge to the validity of those 28 ballots cast in support of strike action – The Board found that no labour relations purpose would be served by declaring any ensuing strike to be unlawful where a majority of employees in the bargaining unit have signalled their

support and to preclude such action on these facts would undermine the essential role to be played by strike (or lockout) in the collective bargaining process – Application dismissed

CANADIAN CORPS OF COMMISSIONAIRES (OTTAWA DIVISION); PUBLIC SERVICE ALLIANCE OF CANADA ..... (Jul./Aug.) 500

Practice and Procedure – Reconsideration – Order for Production – The City sought reconsideration of the Board's decision denying its request for production of certain documents on basis of solicitor-client privilege – The City put the newly-established union to strict proof of union status, requesting drafts and documents relating to the preparation of Minutes from the trade union's founding meeting – The Board held that privilege extends to statements made by a client in furtherance of procuring legal advice – The onus lies on the party requesting disclosure to satisfy the decision-maker that the documents sought are not privileged, based on evidence external to the documents sought – The Board refused to review the documents for which privilege was asserted to discover whether privilege attached – Request for reconsideration denied

CORPORATION OF THE CITY OF WINDSOR; RE CCW-PETU CORPORATION OF THE CITY OF WINDSOR-PROFESSIONAL EMPLOYEES TRADE UNION ..... (Jan./Feb.) 9

Practice and Procedure – Unfair Labour Practice – The employer moved to strike several allegations in the union's unfair labour practice complaint – The Board held that an altercation between two bargaining unit members that involves no threats to either's job security, and about which the employer has no knowledge, cannot support a complaint regarding employer misconduct – As for the other employer objections (regarding purported intimidation by the employer in conversations with individual employees), the Board ordered the union to particularize the allegations, failing which the company will not be required to adduce any evidence in its defence – Matter continues

921964 ONTARIO LIMITED O/A SCUGOG SIGNS; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Mar./Apr.) 132

Prima Facie Motion – Bargaining Unit – Certification – Reconsideration – The union applied to consolidate six bargaining units into three – The employer brought a "no *prima facie* case" motion – The Board has the power to reconsider its past decisions, including certification decisions providing bargaining unit descriptions – However, certificates are spent when the parties enter into their first collective agreement – The bargaining units negotiated by the parties supersede the ones described in the Board's certificates – Hence the current bargaining units, as described in the collective agreements negotiated between the parties, supersede any consolidated units that the Board could order through its reconsideration power – The union has not made out a *prima facie* case for consolidating its bargaining units, which was the relief sought – Motion granted; application dismissed

KINGSTON WHIG STANDARD; RE KINGSTON TYPOGRAPHICAL UNION, LOCAL 30204 ..... (Jul./Aug.) 529

Prima Facie Motion – Strike – The IBEW brought a motion to dismiss an illegal strike application on the basis that the Board should not exercise its discretion to make one or more declarations in the circumstances pleaded by the applicant, Enwin Utilities – The Board determined the motion based on the employer's allegations about a series of

refusals by IBEW members to work emergency overtime – The Board was satisfied that if the facts as alleged were proven, then it could provide a remedy since: there was a history of allegedly unlawful strikes; the union did not appear to be in control of the situation; there was no evidence that the underlying dispute had been eliminated; and the implications of the concerted activity extended beyond the immediate parties to jeopardize the applicant's ability to service its customers in a safe and efficient manner and to restore power to affected areas in a timely manner – Motion dismissed; matter continues

ENWIN UTILITIES LTD.; RE IBEW, LOCAL 636, PATRICK VLANICH et al .....(May/June) 386

Procedural Fairness – Duty of Fair Representation – Judicial Review – Practice and Procedure – At the Board the complainant alleged that the union unfairly responded to her removal from the occasional teachers' list – She was removed from the list after refusing the school board's request to not disseminate her views (that there is a conspiracy involving the Catholic Church, the "Black Pope" and the Illuminati) in the classroom – An initial settlement was reached in which the union agreed to investigate whether a grievance could be filed and where the complainant agreed to an assessment from a psychiatrist – The complainant ultimately refused to cooperate, and the Board found the union had met its duty of fair representation – The court found that the Board's decision was reasonable as there was ample evidence to suggest the union's request for a psychiatric assessment was reasonable and that she had failed to cooperate with it – Additionally the Board's use of a "consultation" did not breach procedural fairness as s. 99 allows the Board to determine a matter without a hearing after "consulting with the parties" and the Board consulted meaningfully with both sides – Application dismissed

HOROCHOWSKI, DANA; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, YORK CATHOLIC DISTRICT SCHOOL BOARD, OLRB.....(Sept./Oct.) 742

Public Sector Labour Relations Transition Act – ONA brought an application for a declaration that a "health services integration" under the *PSLRTA* had occurred – A fertility treatment clinic operated pursuant to a contractual arrangement with the Ottawa Hospital whereby the hospital provided support staff, equipment, laboratory space and facilities – When the clinic was moved to new premises, the employees who followed were only offered employment on the basis that they were new employees; the new clinic did not recognize the bargaining rights that existed in the Hospital setting – The Board held that the Ottawa Hospital and the fertility clinic were "employers" who met the definition of "health services integration" under s.2 of the *PSLRTA* – The Board took a broad view of health services integration, finding root in the "consequences of changes in how service is delivered, rather than on the cause or authors of the change" – The Board held that a health services integration had occurred and exercised its discretion to declare that the *PSLRTA* applied to the integration – Matter continues

OTTAWA FERTILITY CENTRE INC., THE; RE ONTARIO NURSES' ASSOCIATION; RE THE OTTAWA HOSPITAL, CUPE AND ITS LOCAL 4000 AND OPSEU .....(Jan./Feb.) 86

Ratification and Strike Vote – Practice and Procedure – Strike – The union, acting in error (not in bad faith) advised ten employees that they must sign union cards to be eligible to vote for strike action – The Board found as a fact that there were 53 employees in the bargaining unit, 43 of whom voted with 28 voting in favour of strike action – The Board

noted that a clear majority of employees voted in favour of strike action, and that while the union may have breached its obligations under s. 79 for the conduct of strike votes and while some remedy might lie against the union for this conduct, there was no challenge to the validity of those 28 ballots cast in support of strike action – The Board found that no labour relations purpose would be served by declaring any ensuing strike to be unlawful where a majority of employees in the bargaining unit have signalled their support and to preclude such action on these facts would undermine the essential role to be played by strike (or lockout) in the collective bargaining process – Application dismissed

CANADIAN CORPS OF COMMISSIONAIRES (OTTAWA DIVISION); PUBLIC SERVICE ALLIANCE OF CANADA.....(Jul./Aug.) 500

Reconsideration – Bargaining Unit – Certification – Construction Industry – Two unions sought certification for the same employees in non-ICI units in two adjacent Board Areas (9 and 11) – The employer agreed with the bargaining units proposed for Board Area 11, and provided identical Schedule "A" lists in response to each application; however, the employer disagreed that the scope of any bargaining unit should encompass Board Area 9 and asserted that it had no employees working in that Area on the application date – In an earlier decision, the Board (differently constituted) concluded that it had no option but to issue a certificate to each applicant for Board Area 11 – In a continuation of the proceeding, the parties argued about whether it was necessary for each applicant to establish that at least one employee performed work of its trade in Board Area 9 for a majority of his or her working day and what effect this would have on the earlier certificates – The employer argued the Board should reconsider its earlier decision so it could ascertain the "majority of the day" issue – The applicants asserted that the responding party cannot resile from its original position, and the Board should find that someone worked in each Area on the application date, and should either issue two new certificates relating to Board Area 9 or revoke the earlier certificates and issue fresh ones for the broader geographic scope – The Board held that it has never required an applicant applying for a bargaining unit encompassing more than one Board Area to pass a "majority of the day" threshold with respect to more than work in a particular trade – The *Gilvesy* focus is on *what work* was performed, not *where* – The appropriate approach for the Board would be to reconsider the earlier certificates, revoke them and re-issue new certificates reflecting the expanded geographic scope – This should not be an opportunity for the responding party to renege on an earlier position – Hearing directed to ascertain if applicants had any employees performing work in Board Area 9 on the application filing date

BONNECHERE EXCAVATING INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....(May/June) 326

Reconsideration – Bargaining Unit – Certification – *Prima Facie* Motion – The union applied to consolidate six bargaining units into three – The employer brought a "no *prima facie* case" motion – The Board has the power to reconsider its past decisions, including certification decisions providing bargaining unit descriptions – However, certificates are spent when the parties enter into their first collective agreement – The bargaining units negotiated by the parties supersede the ones described in the Board's certificates – Hence the current bargaining units, as described in the collective agreements negotiated between the parties, supersede any consolidated units that the Board could order through its reconsideration power – The union has not made out a *prima facie* case for consolidating its bargaining units, which was the relief sought – Motion granted; application dismissed

KINGSTON WHIG STANDARD; RE KINGSTON TYPOGRAPHICAL UNION, LOCAL 30204 ..... (Jul./Aug.) 529

Reconsideration – Certification – Construction Industry – Judicial Review – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB ..... (Nov./Dec.) 859

Reconsideration – Certification – Construction Industry – The union sought reconsideration of an earlier Board decision allowing the late filing of a response to one of two applications for certification delivered to the employer on the same day – The Board confirmed that the responding party had a legitimate reason to substantiate the late filing of its response when union counsel's cover letters to the two applications for certification were remarkably similar and the courier packaging of the two applications was virtually identical – The Board further held that the delay caused by the late filing was only two days, and not eleven days as asserted by the applicant: the union could have acted on the late filing as soon as it was received--late on a Friday afternoon of a long weekend--rather than waiting until the following Tuesday – Finally, the Board confirmed that it was not ascribing any responsibility to the applicant for the employer's confusion although it did indicate that had the union been clearer about its delivery of the two application packages, such clarity would have gone a long way to undermining the legitimacy of the employer's excuse for its confusion – Reconsideration request denied

CARMAN CONSTRUCTION INC. ; RE IUOE, LOCAL 793 ..... (Mar./Apr.) 160

Reconsideration – Construction Industry – Termination – Timeliness – The Board found that an application for termination was timely because it was filed on the first day of the "commencement of the last three months" of the operation of a collective agreement (s. 63(2)(a)) – The union sought reconsideration of the Board's ruling – The Board confirmed that its calculation was not based on a "measure of time before or after a specified day," but on a plain reading of the statute, understandable to lay persons, of the moment in time when the three-month period began – Reconsideration allowed in part on other grounds

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 ..... (Jan./Feb.) 94

Reconsideration – Construction Industry Grievance – Practice and Procedure – The applicant sought reconsideration of the Board's determination to award it only $2,500 in costs rather than the full indemnity of $6,000 that it had requested – The Board held that costs on a "solicitor-and-client" basis do not entitle a party to *carte blanche* repayment of all its expenses – The Board's practice was that it would consider the reasonableness of the

costs being sought; this was the first instance where an applicant's costs had been seriously challenged by a responding party – The applicant failed to provide the Board with any justification for the amount claimed – Reconsideration request denied

MAN-SHIELD (ONT.) CONSTRUCTION INC. A.K.A. MAN-SHIELD (NWO) CONSTRUCTION INC.; RE CJA, LOCAL 93 ET AL .....(Jan./Feb.) 72

Reconsideration – Construction Industry Grievance – Practice and Procedure – Settlement – The applicant sought reconsideration of a default award because the parties failed to advise the Board of a settlement they had reached prior to the issuance of the default decision – The applicant had originally sought a default decision if the responding party did not file an Intent to Defend, and no such filing occurred – The Board reconsidered its decision but admonished the parties for failing to advise the Board of their settlement, causing the Board to expend time and resources to review a file and issue an unnecessary decision – Reconsideration granted; application withdrawn

NORTH ROCK GROUP LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .....(Jul./Aug.) 548

Reconsideration – Practice and Procedure – Order for Production – The City sought reconsideration of the Board's decision denying its request for production of certain documents on basis of solicitor-client privilege – The City put the newly-established union to strict proof of union status, requesting drafts and documents relating to the preparation of Minutes from the trade union's founding meeting – The Board held that privilege extends to statements made by a client in furtherance of procuring legal advice – The onus lies on the party requesting disclosure to satisfy the decision-maker that the documents sought are not privileged, based on evidence external to the documents sought – The Board refused to review the documents for which privilege was asserted to discover whether privilege attached – Request for reconsideration denied

CORPORATION OF THE CITY OF WINDSOR; RE CCW-PETU CORPORATION OF THE CITY OF WINDSOR-PROFESSIONAL EMPLOYEES TRADE UNION .....(Jan./Feb.) 9

Reference – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Unfair Labour Practice – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197.

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO..... (Mar./Apr.) 314

Reference – Employee – Final Offer Vote – On a Ministerial reference the Board was asked for advice on whether two employees (one with recall rights and an active competition grievance, the other with an active discharge grievance) were "employees in the affected bargaining unit" pursuant to s. 42(1) of the Act – Included in the employer's last offer was a requirement that the union withdraw all outstanding grievances, including the two affecting these employees – Given their interest in the outcome of the vote (possible reinstatement or extinguishment of their potential right to return to work), the Board

followed earlier jurisprudence in *Dan Harris* [*Hall v. Graphic Communications*] and *Satisfied Brake* and advised the Minister that the two individuals' votes were eligible to be counted – Advice provided

ANISHNAWBE MUSHKIKI HEALTH CENTRE; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 7-0 ..... (Sept./Oct.) 603

Related Employer – Construction Industry – Conflict of Interest – Practice and Procedure – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008) ..... (Nov./Dec.) 785

Related Employer – Construction Industry – Evidence – Practice and Procedure – Sale of Business – Union sought to have admitted thirty year old documents as "business records," specifically a letter commenting on the binding nature of a collective agreement – The employer objected arguing that it was caught in an impossible position as it must find the author or another witness to give evidence about documents that apparently created some 30 years ago have played no role in the corporation's existence since that time – The Board found the records were not admissible pursuant to s. 35(2) of the *Evidence Act*, in that the record did not meet any of the conditions set out in the subsection – The Board also found that even if s. 111(2)(c) of the *LRA, 1995* created a wider scope than s. 35, it would not admit the record because the documents are expressions of opinion by parties whose source of information and belief cannot be ascertained, and therefore no weight could be placed on them – Additionally, the Board applied the rule in *Browne v. Dunn* and did not admit evidence that contradicted earlier testimony by a witness where the contradiction was not put to the witness during cross examination – Matter continues

CADILLAC FAIRVIEW COROPORATION LTD., THE, CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS INC. AND REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795 ..... (Jul./Aug.) 491

Related Employer – Sale of Business – OPSEU, representing therapists, brought an application that OCCAC, Kaymar, VON and COTA were a single employer and/or that there was a sale of business from OCCAC to Kaymar and then to VON and COTA – Therapy services were delivered by OCCAC, until the Ministry of Health and Long Term Care directed the OCCAC, along with all other CCACs, to divest itself of therapy services – Kaymar was awarded the first contract and then VON and COTA were the successful candidates in the 2003 competition – First, the Board found that there was no improper purpose by OCCAC in awarding the contracts to VON and COTA – Second, the Board found that all the contractors (Kaymar, COTA and VON) had to varying degrees, brought their own skills, their own ability to measure and accept risk, and their own managers and infrastructure to the task of providing therapy services as a contractor, applying their own entrepreneurial energy to meeting the changing landscape – True contracting out relationships had been established – Related employer applications dismissed; Sale of Business applications dismissed, subject to the Kaymar, OPSEU and OCCAC agreement

OTTAWA COMMUNITY CARE ACCESS CENTRE, KAYMAR REHABILITATION INC., OTTAWA-CARLETON BRANCH OF THE VICTORIAN ORDER OF NURSES AND COTA COMPREHENSIVE REHABILITATION AND MENTAL HEALTH SERVICES; RE OPSEU ..... (Sept./Oct.) 671

Related Employer – Unfair Labour Practice – The applicant union alleged that NSCL and UPCL were related employers and that NSCL must have been contemplating the creation of UPCL during its negotiations with the applicant, thereby bargaining in bad faith – The lay-off of NSCL employees was grieved by the union and the question of relatedness was referred by the parties to the Board – NSCL and UPCL conceded that they were two companies under common control, but did not agree that their businesses or activities were related – On the s. 1(4) issue, the Board could find no evidence of erosion of the applicant's bargaining rights, which were limited to one street address in Hamilton; the establishment of a new business outside of Hamilton had, at best, the effect of denying the applicant an accretion to its existing unit – Regarding the unfair labour practice complaint, the Board held that NSCL was not obligated to disclose its plans for an off-site operation when it was not apparent that such plans would have any detrimental effect on the Hamilton bargaining unit – Both applications dismissed

NATIONAL STEEL CAR LIMITED AND UNIVERSAL PLASMA CUTTING LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7135 ..... (Sept./Oct.) 651

Remedial Certification – Certification – Construction Industry – Practice and Procedure – The union filed an application for certification with less than 40% membership and applied for remedial certification under s. 11 – In its application the applicant failed to identify which certification regime (s. 8 or 128.1) it was choosing – The responding party argued this was fatal – The Board found, based on statements made elsewhere in the application that the applicant had elected to proceed under s. 8 – Additionally, the Board noted that s. 128.1 specifically requires an election and since the applicant had not elected s. 128.1, the application must be dealt with under s. 8 – Matter continues

ASHBRIDGE ELECTRIC CONTRACTORS LIMITED; RE IBEW, LOCAL 353 ..... (Jul./Aug.) 489

Remedies – Certification – Certification Where Act Contravened – Construction Industry – Unfair Labour Practice – The applicant chose to conduct its organizing drive through salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

LECOMPTE ELECTRIC INC.; RE IBEW, LOCAL 586; RE CLAYTON BLOOM ..... (Mar./Apr.) 234

Remedies – Certification where Act Contravened – Construction Industry – Unfair Labour Practice – The union sought remedial certification claiming the employer had dismissed two union organizers – The dismissals occurred the day immediately before the application for certification was filed – The employer subsequently acknowledged breach of the Act through a letter to all employees and the offer of re-employment to the terminated organizers – The union failed to assert that other employees knew about the unfair labour practice activity prior to the application for certification being filed – The union failed to establish that its inability to demonstrate that forty percent or more of the employees in the bargaining unit appeared to be members of the applicant, at the time the application was filed, was as a result of the Employer's unfair labour practice – The Board refused to order remedial certification where the union failed to take any steps to obtain further membership support after unfair labour practice activity – Remedial certification will only be considered where the union is initially able to demonstrate a causal relationship between the Employer's unfair labour practice activity and the union's inability to achieve support at the time the application was filed – Application for Certification dismissed – Unfair Labour Practice settled

K.D. CLAIR CONSTRUCTION LTD., K.D. CLAIR WESTERN INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA ..... (Jan./Feb.) 60

Remedies – Damages – Health and Safety – Reprisal – The Board found in an earlier decision that the termination of the employee was not in breach of the OHSA, but occurred as a result of an argument between the president of the company and the employee – The Board discusses the policies underlying its discretion under s. 50(7), where it finds just cause to discipline, to substitute a penalty that seems just and reasonable in the circumstances – Since his employment was not subject to a collective agreement and he had no Employment Standards entitlements, the Board found that the employee's remedial position should be no better than if he pursued a claim for breach of contract of employment at common law – The Board, however, declined to exercise its discretion to award damages (which it found to be one month) since there was no evidence that the employee had any health and safety concerns or had exercised rights under the Act – Application dismissed

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY ..... (Jan./Feb.) 111

Remedies – Discharge – Interim Relief – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 ..... (Nov./Dec.) 760

Remedies – Discharge for Union Activity – Interim Order – Unfair Labour Practice – A key inside organizer, a day cleaner in the housekeeping department, was dismissed by the employer for allegedly disclosing to a staff member confidential information discarded by another employee – There was no dispute that the inside organizer had never been formally disciplined and had received compliments regarding her work, three star ratings from her employer and was employee of the month – There was no dispute between the parties that the circumstances giving rise to the pending proceeding occurred during a campaign and there was a serious issue to be decided – The Board found that although there was another inside organizer, B was key, in that she had collected four times the number of cards as the other organizer and hence her removal would cause the union irreparable harm – Furthermore, the balance of harm favoured the union in that there was little it could do to counter the loss of a key inside organizer, while there were safeguards the employer could put into place to guard against the possibility that B was disclosing information – Finally, the Board found an appearance of a causal connection between B's right to participate in union organizing and her termination: she had no formal discipline and had received commendations; five days after receiving information of her union activities the employer, after receiving some information alleging improper conduct by B, failed to investigate and did not put the allegations to B – Particulars of the alleged improper conduct were not put to B, nor were these provided in the letter of termination – Interim Reinstatement to same position ordered, with other declarations – Main application proceeds

FIVE BROTHERS HOSPITALITY PARTNERSHIP LIMITED C.O.B. HOLIDAY INN ST. CATHARINES; RE UNITE HERE ..... (Sept./Oct.) 633

Remedies – Practice and Procedure – Contempt – In the context of this sale of business application, the Board ruled, in an earlier decision, that counsel for the union had breached a Confidentiality Order and an implied undertaking of confidentiality with respect to certain documents produced in the proceeding – The Board addressed the issue

of relief available to the employer – The Board found that counsel for the union had aggressively denied having committed the breach for several months, then eventually admitted to it, apologized and claimed inadvertence – The Board determined that the issue of relief was a procedural matter and could be decided on the basis of written submissions – The Board issued a number of orders and declarations, including: (a) that both the union and its counsel breached the implied undertaking and the Confidentiality Order in several ways; (b) that the union and its counsel improperly reproduced the contents of the confidential document in question and improperly used information contained therein for their own purposes (the Board found that the confidentiality applied to both the union and the law firm and that the law firm was acting on behalf of the union) (c) that employer's counsel acted appropriately throughout the proceedings and there was no basis for the allegations of inappropriate or unprofessional conduct complained of by union counsel; (d) that the Confidentiality Order is permanent until the Board directs otherwise, subject to the caveat that the Order does not apply to documents that are otherwise available and were obtained other than through the production order in question; (e) that the law firm ensure that individual counsel do not communicate any information or disclose any documents obtained, or to be obtained, through production in the instant proceeding to anyone in the firm who is not engaged in the instant proceeding or its corollaries; that counsel for the union advise the employer and its counsel of the steps taken to satisfy the obligations under the preceding directions – The Board declined to order that union counsel pay the employer's and its counsel's legal and other expenses incurred as a direct result of the vehement denial of wrongdoing, stating it did not have the jurisdiction to award such costs – The Board also refused to state a case to the Divisional Court asking the Court to inquire into the breach of the implied undertaking and the contempt of the Confidentiality Order, stating that the exercise of such discretion would not sufficiently further labour relations purposes since the underlying purpose of the request was to secure costs – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC., NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA, EAGLE LOGGING INC., BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC.; RE UNITED STEELWORKERS, LOCAL 1-2693; RE KOSKIE MINSKY LLP ..(May/June) 402

Remedy – Certification Where Act Contravened – Construction Industry – Unfair Labour Practice – The union sought remedial certification because of the employer's alleged breaches of the Act – It held captive audience meetings with employees, questioned who had signed union cards, threatened job security, and violated the freeze provisions of the Act by unilaterally giving unprecedented across the board wage increases to employees at the start of the construction season – The Board found that the employer used its standard morning meetings to express views in opposition to the union, and in particular made more than veiled threats to the employees in the captive meetings – Further, the employer implemented wage increases without consultation or input from the union, and contrary to its historical practice – The Board held that no remedy short of remedial certification would sufficiently counter the effects of the employer's conduct – Certificate issued

CARLOS BARBOSA CONCRETE LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 .....(May/June) 334

Representation Vote – Bar – Certification – The employer and incumbent trade union took the position that the application for certification was barred because CUPE had applied seven weeks earlier for the same units – In the first set of applications the Board ordered a vote (sealing the ballots), but questioned whether there was an appearance of 40%

because of undated cards – CUPE wrote requesting that the first applications be dismissed and the Board took this as a concession that there was not an appearance of more than 40% – The Board found no bar applicable to the present application since: the votes were not counted (a condition under s. 10); section 7(10) [withdrawal after a vote] did not apply, as the vote was a nullity since there was no evidence of an appearance of 40% – Additionally, since the employees' wishes had never been tested, and there have been no repetitious withdrawals, there was no reason to exercise the Board's discretion to bar the applicant – Matter continues

SODEXO CANADA LIMITED; RE CUPE; RE LIUNA Local 837 .....(Nov./Dec.) 829

Representation Vote – Certification – Construction Industry – Practice and Procedure – Status – In light of a s. 8.1 challenge as well as status disputes in two certification applications filed by different unions involving the same employer, the Board ordered that the ballots cast in the representation vote be segregated and the ballot box sealed – Unfortunately, the ballots were not segregated – The Board ordered a second representation vote but ruled that only those individuals who cast ballots in the first vote should be eligible to cast ballots in the second vote – Second vote ordered; submissions directed

CLEAN WATER WORKS INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 .....(Sept./Oct.) 617

Representation Vote – Certification – Judicial Review – Stay – A request for a stay of a Board decision ordering a vote count was dismissed in March 2008, with reasons to follow – The Court held that the first part of the test for a stay requires that the applicant establish there is a strong *prima facie* case that the Board's decision is unreasonable, rather than that there was a serious issue to be tried – The applicant failed to pass this test, as well as the other criteria (irreparable harm; balance of convenience) – Stay application dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.....(Jul./Aug.) 599

Representation Vote – Certification – Judicial Review – Stay – The employer sought a stay of the Board's decisions ordering a vote and a ballot count – Request for stay dismissed – Reasons to follow

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OLRB AND OPSEU.....(Mar./Apr.) 306

Representation Vote – Certification – Judicial Review – The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.....(Nov./Dec.) 865

Representation Vote – Certification – Practice and Procedure – The bargaining unit proposed by the union in its application for certification lacked any geographic scope clause – A majority of the Board found that s. 8(2) directs that a representation vote be taken where there is an appearance of 40% membership in the bargaining unit proposed by the union

– A majority of the Board determined that a representation vote must occur and that the ballot box would be sealed – The appropriateness of the bargaining unit would be dealt with as part of the s. 8.1 notice – Vote ordered

WESTERN TORONTO INTERNATIONAL TRUCKS INC.; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ..... (Sept./Oct.) 739

Reprisal – Damages – Health and Safety – Remedies – The Board found in an earlier decision that the termination of the employee was not in breach of the OHSA, but occurred as a result of an argument between the president of the company and the employee – The Board discusses the policies underlying its discretion under s. 50(7), where it finds just cause to discipline, to substitute a penalty that seems just and reasonable in the circumstances – Since his employment was not subject to a collective agreement and he had no Employment Standards entitlements, the Board found that the employee's remedial position should be no better than if he pursued a claim for breach of contract of employment at common law – The Board, however, declined to exercise its discretion to award damages (which it found to be one month) since there was no evidence that the employee had any health and safety concerns or had exercised rights under the Act – Application dismissed

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY ..... (Jan./Feb.) 111

Reprisal – Discharge – Health and Safety – The applicant alleged he had been penalized by a work transfer and a subsequent discharge for instituting a work refusal when he was assigned to drive a particular model of bus – The Board noted that it is generally not the Board's function to determine whether the applicant had been properly accommodated (under the *Human Rights Code*) or to inquire into his work refusal – The Board's focus is on whether the worker was penalized for "acting in compliance" with or "seeking the enforcement of" the *Occupational Health and Safety Act* – The worker must have had the right to refuse work when he exercised that right – The Board held that the applicant's transitional assignments were not a reprisal under the Act – Similarly, his discharge came about after he had been given ample opportunity to accept a transfer and he still insisted on withdrawing his service – Application dismissed

TORONTO TRANSIT COMMISSION; RE ANTHONY JAMES ..... (Sept./Oct.) 695

Reprisal – Employment Standards – The employer sought review of an order for compensation awarded to the employee for an alleged violation of the pregnancy/parental provisions of the Act – The Board found that although the circumstances surrounding the employee's departure from the workplace were clumsy and confusing, and an e-mail sent by a manager to staff was unequivocal that the employee was not returning to the workplace, the employer clarified its position with respect to the employee's status in subsequent communication with the employee's counsel – The Board ruled that it was what the employer actually did, and why, rather than what the employee believed to have happened, that determines the outcome of the review – The Board found that the employee had been granted parental leave, and that he never sought or offered to return to work – Application allowed

SKIIS LTD.; RE KEVIN ST. AUBIN AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (May/June) 454

Reprisal – *Environmental Protection Act* – Practice and Procedure – Timeliness – The employer argued that this reprisal application should be dismissed because it is precluded

by the doctrines of issue estoppel and abuse of process, in addition to being untimely – The Board found that an arbitration panel in a grievance proceeding had fully considered the issues raised by the applicant in this reprisal complaint, even when the union had withdrawn the reprisal component of the grievance during final argument before the arbitration board – The Board also found that the application was untimely; rather than filing immediately after the impugned conduct, the applicant waited until the decision of the arbitration board to make his claim – Application dismissed

CITY OF OTTAWA; RE TED COOPER .....(Jul./Aug.) 507

Reprisal – Health and Safety – The applicant claimed that he had been subject to reprisals for raising health and safety concerns when he was laterally transferred from the position of Radiation Supervisor in the Solid Waste Management Services Division to his former position as Shift Supervisor, and also removed from the Divisional Health and Safety Committee – While occupying the position of Radiation Supervisor, the applicant made various complaints to his supervisors, and to persons to whom they reported, concerning "health & safety concerns", while also complaining that he did not have sufficient time to adequately do all the tasks assigned to him and that his job required more time and energy than could reasonably be expected of one individual (a perceived problem he continually emphasized, notwithstanding the opposite conclusions reached in the resulting audit process) – The city maintained that the applicant's lateral transfer was the result of his expressed inability to adequately perform his assigned duties, and was not disciplinary in nature – The Board found that the applicant's permanent reassignment to the position of Shift Supervisor was wholly in response to his consistent workload complaints, and so was not a reprisal within the meaning of the Act – As such, the city had satisfied its evidentiary burden of establishing that the reassignment was free of any taint of reprisal for voicing health and safety concerns – Application dismissed

CITY OF TORONTO; RE JOHN A. HARWOOD .....(May/June) 352

Sale of a Business – Employment Standards – The employees sought payment of termination pay when Lamantia transferred a lease for a vendor stall to Ippolito at the Ontario Food Terminal – The Board found that the Court of Appeal had recently rejected the traditional "going concern" model for a sale of business in *Abbott v. Bombardier Inc.*, and had expanded the parameters of a transaction to include the transfer of a bundle of tasks and functions performed by an identifiable group of employees – In this case, the employees continued performing the same work for Ippolito, and Ippolito had in fact expanded its own operations to carry on the business of Lamantia – The Board found there was continuity in the employment of the employees and they were consequently not entitled to termination pay – Application dismissed

LAMANTIA GARCIA PRODUCTS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ERWIN REVIN, ANTONIO CARVALHO, JOSE TOSTE AND NAMGYAL KALSANG; RE IPPOLITO PRODUCE LIMITED .....(Jan./Feb.) 67

Sale of Business – Consent to Prosecute – *Crown Employees Collective Bargaining Act* – Interim Relief – Successor Rights – Unfair Labour Practice – AMAPCEO, representing Crown employees working in the Office of Child and Family Service Advocacy, whose duties and responsibilities were being transferred to the Provincial Advocate for Children and Youth (PACY) pursuant to the *Provincial Advocate for Children and Youth Act, 2007*, applied for a declaration of successor rights under s. 10 of *CECBA* – The Board found there was a transfer of an undertaking: all the components of the predecessor OCFSA were conferred to the successor PACY; all former clients of OCFSA continued

as clients of PACY; the same management, supervising and directing the same work force in the same place also continued – The only change was that the employees were no longer Crown employees, but reported to the Legislature – The Board found that PACY failed to meet the onus of establishing that the Legislative privilege it alleged existed was closely and directly connected with the fulfillment of the duties and responsibilities of the Legislature – Board declared PACY to be successor employer; Consent to Prosecute withdrawn, other applications adjourned

THE CROWN IN RIGHT OF ONTARIO AND PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH; RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO ..... (Sept./Oct.) 622

Sale of Business – Construction Industry – Conflict of Interest – Practice and Procedure – Related Employer – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008) ..... (Nov./Dec.) 785

Sale of Business – Construction Industry – Evidence – Practice and Procedure – Related Employer – Union sought to have admitted thirty year old documents as "business records," specifically a letter commenting on the binding nature of a collective agreement – The employer objected arguing that it was caught in an impossible position as it must find the author or another witness to give evidence about documents that apparently created some 30 years ago have played no role in the corporation's existence since that time – The Board found the records were not admissible pursuant to s. 35(2) of the *Evidence Act*, in that the record did not meet any of the conditions set out in the subsection – The Board also found that even if s. 111(2)(c) of the *LRA, 1995* created a wider scope than s. 35, it would not admit the record because the documents are expressions of opinion by parties whose source of information and belief cannot be ascertained, and therefore no weight could be placed on them – Additionally, the Board applied the rule in *Browne v. Dunn* and did not admit evidence that contradicted earlier testimony by a witness where the contradiction was not put to the witness during cross examination – Matter continues

CADILLAC FAIRVIEW COROPORATION LTD., THE, CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS INC. AND REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795 .....(Jul./Aug.) 491

Sale of Business – Related Employer – OPSEU, representing therapists, brought an application that OCCAC, Kaymar, VON and COTA were a single employer and/or that there was a sale of business from OCCAC to Kaymar and then to VON and COTA – Therapy services were delivered by OCCAC, until the Ministry of Health and Long Term Care directed the OCCAC, along with all other CCACs, to divest itself of therapy services – Kaymar was awarded the first contract and then VON and COTA were the successful candidates in the 2003 competition – First, the Board found that there was no improper purpose by OCCAC in awarding the contracts to VON and COTA – Second, the Board found that all the contractors (Kaymar, COTA and VON) had to varying degrees, brought their own skills, their own ability to measure and accept risk, and their own managers and infrastructure to the task of providing therapy services as a contractor, applying their own entrepreneurial energy to meeting the changing landscape – True contracting out relationships had been established – Related employer applications dismissed; Sale of Business applications dismissed, subject to the Kaymar, OPSEU and OCCAC agreement

OTTAWA COMMUNITY CARE ACCESS CENTRE, KAYMAR REHABILITATION INC., OTTAWA-CARLETON BRANCH OF THE VICTORIAN ORDER OF NURSES AND COTA COMPREHENSIVE REHABILITATION AND MENTAL HEALTH SERVICES; RE OPSEU ..... (Sept./Oct.) 671

Sector Determination – Certification – Construction Industry – The first issue to be decided in this application for certification was whether the project (the construction of Goreway Station – a combined cycle gas-powered generation station) was in the ICI or electrical power systems sector – After reviewing the historical background and case law dealing with the boundaries of the electrical power systems sector, the Board addressed the factors for determining a sector dispute – The Board found that the bargaining patterns pointed strongly to the ICI sector; that work characteristics also indicated that the work fell within the ICI; and finally that end use pointed to the electrical power systems sector (although not as strongly) – The Board concluded that the bulk of the project fell in the ICI, and accordingly the application was untimely – Application dismissed

BARCLAY CONSTRUCTION GROUP INC.; RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE IUOE, LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE SNC-LAVALIN POWER ONTARIO INC.; RE IBEW, CONSTRUCTION COUNCIL OF ONTARIO; IBEW, LOCAL 353; RE GOREWAY STATION PARTNERSHIP ..... (Mar./Apr.) 136

Settlement – Abandonment – Employment Standards – Fraud – The two directors agreed to settle the review of orders to pay with 4 of 7 claimants – Irwin paid his portion of the settlement; when Diena failed to make any of the promised payments, the claimants sought to rescind the settlement and reinstate the original Order on grounds of fraud – The Board found that the claimants were fraudulently induced to enter into the settlement because although Diena had the means to pay the settlement, it appears he had no intention to do so – Diena's failure to attend the hearing was further evidence of his lack of commitment to the settlement – The Board voided the settlement and reinstated the full Order to Pay, less monies already paid by Irwin – As for the other 3 claimants,

since Diena failed to appear at the hearing, the Board considered his application against them to be abandoned

DANIEL DIENA, A DIRECTOR OF DELES INDUSTRIES LIMITED; RE MICHAEL J. ASHTON, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS...(Jul./Aug.) 510

Settlement – Bargaining unit – Certification – Construction Industry – The union applied for a bargaining unit outside the ICI sector that included carpenters and labourers, trades which, to the union's knowledge, were the only unrepresented trades working on the date of application – The Employer's response accepted the Union's proposed bargaining unit and the Board determined the bargaining unit that was appropriate for collective bargaining on that basis – At the Regional Certification Meeting the parties confirmed their agreement with respect to the bargaining unit description and when post-RCM submissions were made, the Employer's challenge to the status of one individual was that he spent the majority of his day doing operating engineer's work – The Board noted, in determining whether to amend the bargaining unit, it must reconcile two completing principles: 1) that parties should be bound to the agreements they make; and 2) that outside the ICI sector, construction trade unions must seek bargaining rights within a Board area either for their own craft or for all unrepresented trades at work on the date of application – The Board found that the first principle must yield to the second for the following reasons: first, the labour relations consequences of abrogating the second principle would create too many jurisdictional disputes; second, the individual in question would be in a position where the individual would be highly unlikely to be represented by a bargaining agent; third, the second principle avoids conflicts over bargaining unit descriptions by maintaining a bright line approach (if a craft union applies for more than their trade, they must take all unrepresented trades) – Finally, the Board concluded that a standard bargaining unit for the non-ICI sectors of the construction industry serves to avoid manoevering, gerrymandering, positioning and tactical manipulation in the certification process – Bargaining unit description amended – Matter continues

RAYMAC CUSTOM HOMES AND/OR RAYMAC CORPORATION; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 686

Settlement – Construction Industry Grievance – Practice and Procedure – Reconsideration – The applicant sought reconsideration of a default award because the parties failed to advise the Board of a settlement they had reached prior to the issuance of the default decision – The applicant had originally sought a default decision if the responding party did not file an Intent to Defend, and no such filing occurred – The Board reconsidered its decision but admonished the parties for failing to advise the Board of their settlement, causing the Board to expend time and resources to review a file and issue an unnecessary decision – Reconsideration granted; application withdrawn

NORTH ROCK GROUP LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .....(Jul./Aug.) 548

Settlement – Employment Standards – Practice and Procedure – Almost four years after the settlement of this application for review, the employer sought the Board's permission to compel a labour relations officer to testify on its behalf in a wrongful dismissal suit filed by the employee – The employee's assertion in the civil suit was that she could not read English at the time she entered into the settlement; the employer wanted the officer to give evidence about the employee's language abilities and describe the nature of her discussions with the employee – The Board reiterated its long held view regarding the

importance of maintaining confidentiality in the mediation process - In addition, in the Board's view, there were other ways in which the employer could ascertain the employee's proficiency in the language; the labour relations officer could not be an expert on this aspect of the case – Request denied

OCTOBER ENTERPRISES INCORPORATED; RE RASHIDA (SHEILA) KARMALI AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sept./Oct.) 667

Status – Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – The Board issued a number of preliminary and procedural rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees provided by the responding party at the regional certification meeting because of the prejudice the applicants would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

CLEAN WATER WORKS INC.; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 171

Status – Certification – Construction Industry – Dependent Contractor – In this application for certification, the Applicant alleged that three individuals, McGowan, Page and Baker were all dependent contractors and therefore employees of Salzburg – The individuals conducted 90 to 100% of their work for Salzburg – McGowan and Page both provided work to Salzburg through business entities and were free to accept and refuse any projects, however, they rarely refused projects from Salzburg – There was very little supervision – The Board found that McGowan was a dependant contractor for the purposes of the *Labour Relations Act* – He was in a position of economic dependence upon Salzburg – Their relationship exhibited the same hallmarks as that of an hourly employee – Conversely, the Board found that Page and Baker were not employees of Salzburg – The evidence clearly showed that Page was the employer of Baker – All direction was provided by Page and not Salzburg – Page was an independent contractor, who had entered into a voluntary agreement with the Applicant and therefore was bound by a collective agreement – Matter continues

SALZBURG INTERIORS & FURNITURE LTD.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA ..... (Jan./Feb.) 96

Status – Certification – Construction Industry – Judicial Review – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted

that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

ANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB .....(Nov./Dec.) 858

Status – Certification – Construction Industry – Practice and Procedure – Representation Vote – In light of a s. 8.1 challenge as well as status disputes in two certification applications filed by different unions involving the same employer, the Board ordered that the ballots cast in the representation vote be segregated and the ballot box sealed – Unfortunately, the ballots were not segregated – The Board ordered a second representation vote but ruled that only those individuals who cast ballots in the first vote should be eligible to cast ballots in the second vote – Second vote ordered; submissions directed

LEAN WATER WORKS INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Sept./Oct.) 617

Status – Certification – Construction Industry – The Board examined whether five individuals were employees of the responding party on the date of the application for certification, and whether they were properly included in the bargaining unit – During the Labourers' province-wide strike in the ICI sector in June of 2007, five union members were sent to work for the non-union responding party – The work done had previously been sub-contracted to a company who was bound to the provincial ICI agreement and therefore was unable to maintain the contract due to the strike – The work was subsequently done by carpenters after the five labourers, whose status was to be decided in this proceeding, were no longer required – The Board held that two unions doing the same work on different days did not act as a bar to certification so long as both unions' members were performing work falling within their jurisdiction – An application for certification is not the appropriate time to deal with work jurisdiction disputes – The Board found that the five individuals were under the direction of the responding party's representative and were doing work as its employees – The responding party asserted that (1) the employees were unlawfully working on the date of the application because they were members of the union who were on a province-wide ICI strike; (2) the referral by the union of striking workers constituted an unlawful arrangement under section 162(2) of the Act and, having referred the workers, the union cannot rely on its own misconduct as the basis for a certification application – The Board held that the impugned actions do not frustrate the purpose of section 162(2): the prevention of agreements between a union and a union contractor to keep working through a lawful strike – In the circumstance where the non-union employer sought the referral from the union, voluntarily accepted the employees, acquired the benefit of the work, and thereby contributed to the arrangement, the employer cannot rely on the fact the agreement was otherwise unlawful to defend itself from an application for certification – The status of the individuals was resolved in favour of inclusion in the bargaining unit – Matter continues

VM HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Jan./Feb.) 43

Status – Certification – Construction Industry – The Board held that three employees performing grading work on gravel roads and surfaces were engaged in maintenance and

not repair, and therefore they were excluded from the construction bargaining unit the applicant was seeking – The maintenance work involved fixing potholes and leveling the surfaces on roads, driveways and in a parking lot – No new material was added or taken away, and the surfaces were at all times functional before, during and after the work was performed – Matter continues

LLWOOD ROBINSON LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 197

Status – Certification – Construction Industry – Trade Union – The Labourers challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – The Board held that a previous decision granting CCWU status as a trade union in the construction industry, *PBS Construction*, was not binding on the Labourers because they had been denied status to participate in that proceeding – The CCWU's purported collective agreements with three employers in the construction industry were found not to be valid by the Board because the employer signatories to the impugned agreements were not employers under the Act, or (in one instance) because of employer support in the formation or administration of the trade union – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – Applications dismissed

MPIRE CONTINENTAL MANAGEMENT C.O.B. EMPIRE COMMUNITIES AND/OR EMPIRE HOMES; RE CANADIAN CONSTRUCTION WORKERS UNION; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Mar./Apr.) 21

Status – Certification – Employee – The parties could not agree on whether certain employees were full-time or part-time – The employees in dispute ("Casual Maintenance Workers/ Operators – On Call") were paid for a minimum of twenty-five hours per week and were required to hold themselves available to the employer for those hours, albeit not at the workplace – The employer argued that these were part-time employees, relying on the Board's jurisprudence ("regularly employed for not more than twenty-fours hours" in four of the last seven weeks leading up to the application for certification) and asserting that the Board should consider "hours worked" as opposed to "hours paid" – The Board held that the disputed employees were required to demonstrate a full-time commitment to the employer and therefore should be included in the full-time bargaining unit – Count ordered

WD ROADS MANAGEMENT INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 .....(Jul./Aug.)

Stay – Certification – Judicial Review – Representation Vote – A request for a stay of a Board decision ordering a vote count was dismissed in March 2008, with reasons to follow – The Court held that the first part of the test for a stay requires that the applicant establish there is a strong *prima facie* case that the Board's decision is unreasonable, rather than that there was a serious issue to be tried – The applicant failed to pass this test, as well as the other criteria (irreparable harm; balance of convenience) – Stay application dismissed

DGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB .....(Jul./Aug.) 5

Stay – Certification – Judicial Review – Representation Vote – The employer sought a stay of the Board's decisions ordering a vote and a ballot count – Request for stay dismissed – Reasons to follow

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OLRB AND OPSEU.....(Mar./Apr.) 306

Strike – Construction Industry – Interim Relief – Jurisdictional Dispute – Practice and Procedure – Local 793 sought an interim order that would return "flagman" work from Local 506 to its members pending the resolution of the main application – Ellis-Don, which is bound by collective agreements to Local 506, subcontracted work to Metric, which is bound by collective agreements to Local 793, but not Local 506 – Metric assigned the "flagman" work to Local 793 – Local 506 was effective in lobbying Ellis Don to change the work assignment and give it to 506 – The Board found no basis for issuing an interim order simply because the general contractor responsible for the project decided to change the work assignment after one of the unions adversely affected by the initial assignment was effective in lobbying – On the declarations filed the Board did not find any direct evidence of a threat to engage in a strike, cause a strike or otherwise disrupt the work at the project – Absent the above evidence, and given an explicit and credible denial of any threat having been made, the Board found that an interim order would be inappropriate – Application dismissed; matter continues

METRIC CONTRACTING SERVICES CORPORATION; RE IUOE, LOCAL 793; RE LIUNA, LOCAL 506, ELLIS-DON CONSTRUCTION LTD.....(May/June) 428

Strike – Practice and Procedure – Ratification and Strike Vote – The union, acting in error (not in bad faith) advised ten employees that they must sign union cards to be eligible to vote for strike action – The Board found as a fact that there were 53 employees in the bargaining unit, 43 of whom voted with 28 voting in favour of strike action – The Board noted that a clear majority of employees voted in favour of strike action, and that while the union may have breached its obligations under s. 79 for the conduct of strike votes and while some remedy might lie against the union for this conduct, there was no challenge to the validity of those 28 ballots cast in support of strike action – The Board found that no labour relations purpose would be served by declaring any ensuing strike to be unlawful where a majority of employees in the bargaining unit have signalled their support and to preclude such action on these facts would undermine the essential role to be played by strike (or lockout) in the collective bargaining process – Application dismissed

CANADIAN CORPS OF COMMISSIONAIRES (OTTAWA DIVISION); PUBLIC SERVICE ALLIANCE OF CANADA.....(Jul./Aug.) 500

Strike – *Prima Facie* Motion – The IBEW brought a motion to dismiss an illegal strike application on the basis that the Board should not exercise its discretion to make one or more declarations in the circumstances pleaded by the applicant, Enwin Utilities – The Board determined the motion based on the employer's allegations about a series of refusals by IBEW members to work emergency overtime – The Board was satisfied that if the facts as alleged were proven, then it could provide a remedy since: there was a history of allegedly unlawful strikes; the union did not appear to be in control of the situation; there was no evidence that the underlying dispute had been eliminated; and the implications of the concerted activity extended beyond the immediate parties to jeopardize the applicant's ability to service its customers in a safe and efficient manner

and to restore power to affected areas in a timely manner – Motion dismissed; matter continues

ENWIN UTILITIES LTD.; RE IBEW, LOCAL 636, PATRICK VLANICH et al .....(May/June) 386

Successor Rights – Consent to Prosecute – *Crown Employees Collective Bargaining Act* – Interim Relief – Sale of Business – Unfair Labour Practice – AMAPCEO, representing Crown employees working in the Office of Child and Family Service Advocacy, whose duties and responsibilities were being transferred to the Provincial Advocate for Children and Youth (PACY) pursuant to the *Provincial Advocate for Children and Youth Act, 2007*, applied for a declaration of successor rights under s. 10 of *CECBA* – The Board found there was a transfer of an undertaking: all the components of the predecessor OCFSA were conferred to the successor PACY; all former clients of OCFSA continued as clients of PACY; the same management, supervising and directing the same work force in the same place also continued – The only change was that the employees were no longer Crown employees, but reported to the Legislature – The Board found that PACY failed to meet the onus of establishing that the Legislative privilege it alleged existed was closely and directly connected with the fulfillment of the duties and responsibilities of the Legislature – Board declared PACY to be successor employer; Consent to Prosecute withdrawn, other applications adjourned

THE CROWN IN RIGHT OF ONTARIO AND PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH; RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO ..... (Sept./Oct.) 622

Summons – Mediation – Practice and Procedure – Superior Court of Justice (Small Claims Court) – The Board brought a motion to quash a summons issued to a Labour Relations Officer to testify in a civil proceeding – The Court found that s. 117 was clear on its face—without the Board's consent the officer can not be made to testify regarding things done or not done in the course of their employment – The Board had refused to grant its consent and that decision (*infra*, p.55) was before the Court – Motion granted

WOODCOCK, JEREMY WILLIAM; RE RONALD GOODCHILD..... (Mar./Apr.) 121

Summons – Mediation – Practice and Procedure – The Board received a request to permit a Labour Relations Officer to testify in a civil proceeding (see court ruling under Court Proceedings below) about matters respecting information obtained in the discharge of her duties – The Board reviewed the case law and policy underlying section 117, which requires the consent of the Board before an officer may testify in a civil proceeding, and decided there were no grounds for exercising its discretion to allow the Officer to testify – Consent not granted

JEREMY WOODCOCK; RE UNITED STEELWORKERS OF AMERICA LOCAL 6571; RE GERDAU AMERISTEEL INC. ..... (Mar./Apr.) 55

Superior Court of Justice (Small Claims Court) – Mediation – Practice and Procedure – Summons – The Board brought a motion to quash a summons issued to a Labour Relations Officer to testify in a civil proceeding – The Court found that s. 117 was clear on its face—without the Board's consent the officer can not be made to testify regarding things done or not done in the course of their employment – The Board had refused to grant its consent and that decision (*infra*, p.55) was before the Court – Motion granted

WOODCOCK, JEREMY WILLIAM; RE RONALD GOODCHILD..... (Mar./Apr.) 121

Termination – Bargaining Rights – Constitutional Law – Construction Industry – Employer – The Independent Electricity Market Operator, currently called the Independent Electricity System Operator (IESO), sought a declaration that it was a non-construction employer because it was a consumer of construction services and not a vendor of same – If such a declaration were to issue from the Board, the unions reserved the right to challenge the constitutionality of the non-construction employer provisions – The IESO has two main functions: (1) to ensure the reliable operation of the electrical power system in Ontario; and (2) to operate the wholesale electricity market in Ontario (including a price-setting function) – The IESO is neither a generator nor a transmitter of electricity; it ensures the reliability of the electrical power system in the province through market rules and operating agreements with various market participants – There was no dispute that the IESO engages contractors from time to time to perform construction work for its own benefit – The Board found that market fees paid to the IESO by market participants are not the kind of compensation contemplated by the definition of a non-construction employer – The Board found the situation in the present case to be similar to government funding provided to a school board that the board uses to pay for construction activity: the funds are not paid in order for construction work to be performed for the benefit of the giver of the funds – Non-construction employer declaration granted – Matter referred to Registrar to schedule constitutional argument

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE LIUNA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059..... (Mar./Apr.) 210

Termination – Bargaining Rights – Employer Initiation – Evidence –In an application seeking to terminate the bargaining rights of the union, the Board found that although there was very little direct evidence establishing that the employer initiated the application, the union was perfectly entitled to meet its onus through circumstantial evidence – The employee's evidence concerning his motivation for filing the application was not credible – He was not honest regarding how he became aware that a termination application could be filed, when such an application would be timely under the LRA and in describing his alleged motivation for bringing the application – The only natural explanation the Board could draw from his dishonesty was the desire to cover up the fact that his employer initiated the application – Application dismissed

2890275 CANADA INC. O/A ENER-TECH; RE PATRICK POISSON RE IBEW, LOCAL 586..... (Mar./Apr.) 123

Termination – Constitutional Law – Bargaining Rights – An employee in the construction industry applied for termination of bargaining rights – The union argued that on the application date, the applicant's work was within federal jurisdiction – The applicant was installing sensors to monitor temperature and humidity in computerized offices used by a federal intelligence/security agency, a core federal undertaking – The removal of labour relations from provincial competence is exceptional, and is only appropriate when the subsidiary's work is integral to a core federal undertaking – The Board held that the sensor system was not integral to the core federal undertaking – The construction employer did no work that was directly or indirectly related to the agency's federal purposes in intelligence and security – Therefore, the employer's labour relations were governed by the *Labour Relations Act* and by the Board – Matter continues

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; RE THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 .....(Jul./Aug.) 563

Termination – Construction Industry – Parties – Timeliness – The applicant sought to terminate the bargaining rights of LIUNA Local 607 – There was no dispute that the bargaining rights were held by LIUNA, Ontario Provincial District Council – The Board found that the OPDC must have been certified on the basis of the employees' membership in Local 607, since employees can only be members of locals, and not of the council – Local 607 conducted bargaining, drafted collective agreements, and made the application for the appointment of the conciliator – The Board held that given that the OPDC and Local 607 could agree on the transfer of bargaining rights, and given such a widespread practice once a certificate had been issued, it was not unreasonable for the applicant to assume that Local 607 was his bargaining agent – The style of cause was amended to include both Local 607 and the OPDC – On the issue of the timeliness of the application, the Board held that when the application was filed on the same day as a conciliation officer was appointed, the application was timely – Submissions ordered on status issues – Matter continues

A-1 SUPERIOR PAVING AND CONCRETE WORKS COMPANY INC.; RE DANIEL WILSON; RE LIUNA – CONSTRUCTION AND ALLIED WORKERS, LOCAL 607, AND LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .....(Jul./Aug.) 485

Termination – Construction Industry – Reconsideration – Timeliness – The Board found that an application for termination was timely because it was filed on the first day of the "commencement of the last three months" of the operation of a collective agreement (s. 63(2)(a)) – The union sought reconsideration of the Board's ruling – The Board confirmed that its calculation was not based on a "measure of time before or after a specified day," but on a plain reading of the statute, understandable to lay persons, of the moment in time when the three-month period began – Reconsideration allowed in part on other grounds

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 ..... (Mar./Apr.) 94

Timeliness – Certification – Construction Industry – Practice and Procedure – The IUOE asked the Board to refuse to consider the response to its application for certification since the respondent had failed to file within the time limits set out by the Act and the Board's Rules of Procedure – The applicant had contemporaneously filed an industrial application and a construction application for certification – The Board reviewed its jurisprudence on the exercise of its discretion – In the instant case, the Board held that the respondent's error in believing there to be only one application for certification was reasonable in the circumstances – The Board found that the IOUE contributed to the respondent's confusion by simultaneously delivering multiple applications, each with a cover letter on the same letterhead with the same solicitor's file number on it – The Board held that applicant could have alerted the respondent to fact that there were two applications – The Board exercised its discretion and considered the information contained in the late-filed response – Matter continues

ARMAN CONSTRUCTION INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Mar./Apr.) 1

Timeliness – Construction Industry – Parties – Termination – The applicant sought to terminate the bargaining rights of LIUNA Local 607 – There was no dispute that the bargaining rights were held by LIUNA, Ontario Provincial District Council – The Board found that the OPDC must have been certified on the basis of the employees' membership in Local 607, since employees can only be members of locals, and not of the council – Local 607 conducted bargaining, drafted collective agreements, and made the application for the appointment of the conciliator – The Board held that given that the OPDC and Local 607 could agree on the transfer of bargaining rights, and given such a widespread practice once a certificate had been issued, it was not unreasonable for the applicant to assume that Local 607 was his bargaining agent – The style of cause was amended to include both Local 607 and the OPDC – On the issue of the timeliness of the application, the Board held that when the application was filed on the same day as a conciliation officer was appointed, the application was timely – Submissions ordered on status issues – Matter continues

-1 SUPERIOR PAVING AND CONCRETE WORKS COMPANY INC.; RE DANIEL WILSON; RE LIUNA – CONSTRUCTION AND ALLIED WORKERS, LOCAL 607, AND LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL .....(Jul./Aug.) 485

Timeliness – Construction Industry – Reconsideration – Termination – The Board found that an application for termination was timely because it was filed on the first day of the "commencement of the last three months" of the operation of a collective agreement (s. 63(2)(a)) – The union sought reconsideration of the Board's ruling – The Board confirmed that its calculation was not based on a "measure of time before or after a specified day," but on a plain reading of the statute, understandable to lay persons, of the moment in time when the three-month period began – Reconsideration allowed in part on other grounds

ÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 ..... (Mar./Apr.) 94

Timeliness – Discharge – Employment Standards – Wilful Misconduct – Evidence – The applicant was terminated from his position as assistant manager of a grocery store following the alleged theft of some apples, an act that he denies doing (his evidence before the Board was uncontradicted) – The Ministry of Labour did not receive the applicant's claim until more than eight months after his termination – The Employment Standards Officer reasoned that she was prohibited from issuing an order under subsection 111(1) of the Act because more than six months had elapsed since the termination of employment – The Board held that the applicant's last day of work was not determinative of the issue since a proper analysis must take into account the nature of the wages and when they became due – The claim for unpaid wages was denied, but vacation pay was awarded – In considering whether the applicant was entitled to termination pay, the Board noted that the employer had simply told the applicant not to report to work until further advised – The Board held that the applicant was entitled to conclude that his employment was terminated 13 weeks after his last day worked; as such, any claim for outstanding wages, including termination pay, was clearly within the parameters of subsection 111(1) – Finally, the Board considered whether the applicant had been guilty of wilful misconduct so as to disentitle him to termination pay: since the employer failed to appear at the hearing (and there was no other evidence available that spoke directly to the alleged offence), there was insufficient evidence to conclude that the applicant was so guilty – Application allowed in part

NASR FOODS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RAFI KALTAKIAN .....(May/June) 440

Timeliness – *Environmental Protection Act* – Practice and Procedure – Reprisal – The employer argued that this reprisal application should be dismissed because it is precluded by the doctrines of issue estoppel and abuse of process, in addition to being untimely – The Board found that an arbitration panel in a grievance proceeding had fully considered the issues raised by the applicant in this reprisal complaint, even when the union had withdrawn the reprisal component of the grievance during final argument before the arbitration board – The Board also found that the application was untimely; rather than filing immediately after the impugned conduct, the applicant waited until the decision of the arbitration board to make his claim – Application dismissed

CITY OF OTTAWA; RE TED COOPER .....(Jul./Aug.) 507

Timeliness – Health and Safety – Practice and Procedure – After the inspector reviewed the applicant's complaint at the workplace, the applicant was advised there was no contravention of the Act – The inspector did not issue an Order – The inspector returned to the workplace three days later and provided the employer with a Field Visit report, but did not provide the complainant with the report – There is no provision in the Act requiring the inspector to confirm in writing the refusal to issue an order, nor requiring the inspector to provide the complainant with the Field Visit report until it is asked for – The applicant appealed to the Board within 30 days of having received the Field Visit report, but beyond the 30 days of the Inspector's decision not to issue an order – The Board found the appeal untimely – Appeal dismissed

CASTONGUAY BLASTING GP AND CLAUDE NADON, INSPECTOR; RE STEVEN MROCZYNSKI.....(Jul./Aug.) 504

Timeliness – Health and Safety – The applicant filed a request for suspension of an inspector's order on Form A-67 twenty-nine days after the order was issued, but did not file an appeal of the order within the 30-day time limit set out in s. 61(1) of the *Occupational Health and Safety Act* – The issue before the Board was whether the appeal was timely – The Board found that all the information required to initiate an appeal was contained in Form A-67, and the Board's Rules of Procedure allow it to relieve against the strict application of the Rules – The Board relieved against the strict application of Rule 22.1 which requires an appeal to be launched on Form A-65 – The late-filed form was viewed as an amendment of the timely appeal filed four days earlier – Matter proceeds

DYNAMIC PROPERTIES INC.; RE RICK CARPENTER, JOSIE ROQUE AND DAVE MACDONALD, INSPECTOR.....(Nov./Dec.) 775

Trade Union – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – After the parent trade union (UBC) assumed supervision over the Local, the Local brought an application to the Board under s. 147 and 149 – Two matters were at issue: the Local's refusal to provide data in a digital format to UBC (ULTRA issue) and the fact that persons were permitted by the Local to work in its area without becoming, or being permitted to become, members of the Local ("permit workers" issue) – The Board noted the underlying tension between UBC and the Local since UBC had reduced the number of locals and required them to join together into two regional councils – Although the parties settled the Ultra issue, the Board noted that the lack of forthrightness on the part of the Local and the lengthy delay in putting forward any sort of explanation was inappropriate – The Board found that the Local failed in its obligation

to provide full disclosure to UBC of an issue in which it had a legitimate interest and a right to be informed – Such a refusal gave UBC just cause to restrict the autonomy of the Local by way of supervision but not to the extent of the one that was imposed – The Board made a more limited order addressing the production of information about permit workers from the Local to UBC – Declaration made

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL UNION 1256; RE ARNOLD BONGERS ET AL, AS THE TRUSTEES OF THE CARPENTERS' LOCAL 1256 PENSION PLAN, THE CARPENTERS' LOCAL 1256 VACATION PAY PLAN AND THE CARPENTERS' LOCAL 1256 WELFARE PLAN ..... (Sept./Oct.) 715

Trade Union – Certification – Construction Industry – Judicial Review – Status – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB ..... (Nov./Dec.) 858

Trade Union – Certification – Construction Industry – Status – The Labourers challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – The Board held that a previous decision granting CCWU status as a trade union in the construction industry, *PBS Construction*, was not binding on the Labourers because they had been denied status to participate in that proceeding – The CCWU's purported collective agreements with three employers in the construction industry were found not to be valid by the Board because the employer signatories to the impugned agreements were not employers under the Act, or (in one instance) because of employer support in the formation or administration of the trade union – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – Applications dismissed

EMPIRE CONTINENTAL MANAGEMENT C.O.B. EMPIRE COMMUNITIES AND/OR EMPIRE HOMES; RE CANADIAN CONSTRUCTION WORKERS UNION; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Mar./Apr.) 21

Trusteeship – Interim Relief – Local 1256 filed complaints under section 147 and 149 and sought interim relief seeking to restrain the IU from directly or indirectly interfering with the assets, property, bargaining rights or duties of the Local – The IU had initiated proceedings under its Constitution which were a first step towards the imposition a supervision – The Board held that it was unable to evaluate the appropriate factors underlying the test for interim relief because the facts supporting the application were yet to mature – The Board refused to speculate on the IU's intentions or the foreseeability of supervision absent cogent evidence, whether present or historical, to support the inference that supervision was imminent – Without a demonstration of immediate harm that would accrue to Local 1256 on the surprise imposition of a supervision, the Board refused to offer interim relief because the Local could file a section 149 application which would allow Board to inquire into the cause for supervision – The threat that parties may resort to self-help remedies if the Board does not act is an inappropriate factor to consider in deciding whether to issue an order – Application for interim relief dismissed

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL 1256 ..... (Mar./Apr.) 115

Unfair Labour Practice – Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Status – The Board issued a number of preliminary and procedural rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees provided by the responding party at the regional certification meeting because of the prejudice the applicants would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

CLEAN WATER WORKS INC.; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 171

Unfair Labour Practice – Certification – Certification Where Act Contravened – Construction Industry – Remedies – The applicant chose to conduct its organizing drive through salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

LECOMPTE ELECTRIC INC.; RE IBEW, LOCAL 586; RE CLAYTON BLOOM ..... (Mar./Apr.) 234

Unfair Labour Practice – Certification – Construction Industry – Employer Support – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

PRE-ENG CONTRACTING LTD.; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, LOCAL 506; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNTED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (Mar./Apr.) 284

Unfair Labour Practice – Certification where Act Contravened – Construction Industry – Remedies – The union sought remedial certification claiming the employer had dismissed two union organizers – The dismissals occurred the day immediately before the application for certification was filed – The employer subsequently acknowledged breach of the Act through a letter to all employees and the offer of re-employment to the terminated organizers – The union failed to assert that other employees knew about the unfair labour practice activity prior to the application for certification being filed – The union failed to establish that its inability to demonstrate that forty percent or more of the employees in the bargaining unit appeared to be members of the applicant, at the time the application was filed, was as a result of the Employer's unfair labour practice – The Board refused to order remedial certification where the union failed to take any steps to obtain further membership support after unfair labour practice activity – Remedial certification will only be considered where the union is initially able to demonstrate a causal relationship between the Employer's unfair labour practice activity and the union's inability to achieve support at the time the application was filed – Application for Certification dismissed – Unfair Labour Practice settled

K.D. CLAIR CONSTRUCTION LTD., K.D. CLAIR WESTERN INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA ..... (Mar./Apr.) 60

Unfair Labour Practice – Certification Where Act Contravened – Construction Industry – Remedy – The union sought remedial certification because of the employer's alleged breaches of the Act – It held captive audience meetings with employees, questioned who had signed union cards, threatened job security, and violated the freeze provisions of the Act by unilaterally giving unprecedented across the board wage increases to employees at the start of the construction season – The Board found that the employer used its standard morning meetings to express views in opposition to the union, and in particular made more than veiled threats to the employees in the captive meetings – Further, the employer implemented wage increases without consultation or input from the union, and contrary to its historical practice – The Board held that no remedy short of remedial certification would sufficiently counter the effects of the employer's conduct – Certificate issued

CARLOS BARBOSA CONCRETE LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 .....(May/June) 334

Unfair Labour Practice – Consent to Prosecute – *Crown Employees Collective Bargaining Act* – Interim Relief – Sale of Business – Successor Rights – AMAPCEO, representing Crown employees working in the Office of Child and Family Service Advocacy, whose duties and responsibilities were being transferred to the Provincial Advocate for Children and Youth (PACY) pursuant to the *Provincial Advocate for Children and Youth Act, 2007*, applied for a declaration of successor rights under s. 10 of *CECBA* – The Board found there was a transfer of an undertaking: all the components of the predecessor OCFSA were conferred to the successor PACY; all former clients of OCFSA continued as clients of PACY; the same management, supervising and directing the same work force in the same place also continued – The only change was that the employees were no longer Crown employees, but reported to the Legislature – The Board found that PACY failed to meet the onus of establishing that the Legislative privilege it alleged existed was closely and directly connected with the fulfillment of the duties and responsibilities of the Legislature – Board declared PACY to be successor employer; Consent to Prosecute withdrawn, other applications adjourned

THE CROWN IN RIGHT OF ONTARIO AND PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH; RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO ..... (Sept./Oct.) 622

Unfair Labour Practice – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197.

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO ..... (Mar./Apr.) 314

Unfair Labour Practice – *Crown Employees Collective Bargaining Act* – Practice and Procedure –Witness – The matter involves events that occurred over twenty-five years ago that only came to light recently – The parties asked the Board to first determine whether it had the jurisdiction to hear a complaint that sections of the old CECBA had been breached (assuming the allegations made out a case, the complaint was timely, and the Board would grant a remedy) – Relying on the *Legislation Act*, the Board found that the complainants' rights came into existence under old CECBA, and its repeal did not affect those rights; new-CECBA repealed the old, such that new-CECBA proceedings were to be followed; and no contrary intention appeared – The Board also noted that rights must be vindicated in some forum and a purposeful analysis leads to the conclusion that the Board's specialized expertise is more appropriate, in these circumstances, than the courts – Accordingly, the Board has the jurisdiction to hear the complaint – Matter continues

GOVERNMENT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES; RE OPSEU, ROBERT GORDON, MICHAEL MCKINNON, WILLIAM BRADLEY, ROBERT MOREAU, JOE D'ANDREA AND STEPHEN LONSDALE .....(May/June) 395

Unfair Labour Practice – Discharge – Interim Order – The union sought interim reinstatement of five employees, pending resolution of the main application which alleged that they were discharged for union activity – The employees worked as cleaners in a plant under construction, and were dismissed when the construction was completed – The Board held that the employees appeared to have been dismissed for their earlier union activity, because there was no other reasonable explanation for their dismissal – Although the construction work was over, the employer by its own admission needed many cleaners to work in the finished plant, and these employees were already trained and gave no cause for dismissal – The Board held that the discharges occurred during an organizing campaign; there was a serious issue to be tried; a failure to reinstate the workers would irreparably harm the union; and the reinstatement would not harm the employer – Interim order granted

MARTIN BUILDING MAINTENANCE; RE LIUNA, LOCAL 1059.....(Jul./Aug.) 538

Unfair Labour Practice – Discharge – Interim Relief – Remedies – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 .....(Nov./Dec.) 760

Unfair Labour Practice – Discharge for Union Activity – Interim Order – Remedies – A key inside organizer, a day cleaner in the housekeeping department, was dismissed by the employer for allegedly disclosing to a staff member confidential information discarded by another employee – There was no dispute that the inside organizer had never been formally disciplined and had received compliments regarding her work, three star ratings from her employer and was employee of the month – There was no dispute between the parties that the circumstances giving rise to the pending proceeding occurred during a campaign and there was a serious issue to be decided – The Board found that although there was another inside organizer, B was key, in that she had collected four times the number of cards as the other organizer and hence her removal would cause the union irreparable harm – Furthermore, the balance of harm favoured the union in that there was little it could do to counter the loss of a key inside organizer, while there were safeguards the employer could put into place to guard against the possibility that B was disclosing information – Finally, the Board found an appearance of a causal connection between B's right to participate in union organizing and her termination: she had no formal

discipline and had received commendations; five days after receiving information of her union activities the employer, after receiving some information alleging improper conduct by B, failed to investigate and did not put the allegations to B – Particulars of the alleged improper conduct were not put to B, nor were these provided in the letter of termination – Interim Reinstatement to same position ordered, with other declarations – Main application proceeds

FIVE BROTHERS HOSPITALITY PARTNERSHIP LIMITED C.O.B. HOLIDAY INN ST. CATHARINES; RE UNITE HERE ..... (Sept./Oct.) 633

Unfair Labour Practice – Duty of Fair Representation – Judicial Review – Practice and Procedure – The court held that it is not the function of the Board, in determining a duty of fair representation complaint, to review the merits of an arbitration award or the procedural decisions that the arbitrator made – The Board had no jurisdiction to determine whether the Employer violated the collective agreement or other statutes governing the employment relationship – The decision not to allow the Board proceedings to be recorded is within the Board's discretion pursuant to s. 110(16) provided it gives full opportunity to the parties to present their evidence and to make submissions – The Board did not act improperly or offend the rules of procedural fairness when it refused to permit the reporter – The Board was reasonable in directing that the applicant seek leave of the Board prior to bringing another s. 74 complaint against the Union – The conclusion that the repeated allegations of s. 74 violations against the Union had become an abuse of process was reasonably made in an effort to control the Board's process – Application for Judicial Review dismissed

GUS NEDELKOPOULOS; OLRB; RE A.G.S. AUTOMOTIVE OSHAWA AND C.A.W. LOCAL 222 ..... (Mar./Apr.) 314

Unfair Labour Practice – Practice and Procedure – The employer moved to strike several allegations in the union's unfair labour practice complaint – The Board held that an altercation between two bargaining unit members that involves no threats to either's job security, and about which the employer has no knowledge, cannot support a complaint regarding employer misconduct – As for the other employer objections (regarding purported intimidation by the employer in conversations with individual employees), the Board ordered the union to particularize the allegations, failing which the company will not be required to adduce any evidence in its defence – Matter continues

21964 ONTARIO LIMITED O/A SCUGOG SIGNS; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Mar./Apr.) 132

Unfair Labour Practice – Related Employer – The applicant union alleged that NSCL and UPCL were related employers and that NSCL must have been contemplating the creation of UPCL during its negotiations with the applicant, thereby bargaining in bad faith – The lay-off of NSCL employees was grieved by the union and the question of relatedness was referred by the parties to the Board – NSCL and UPCL conceded that they were two companies under common control, but did not agree that their businesses or activities were related – On the s. 1(4) issue, the Board could find no evidence of erosion of the applicant's bargaining rights, which were limited to one street address in Hamilton; the establishment of a new business outside of Hamilton had, at best, the effect of denying the applicant an accretion to its existing unit – Regarding the unfair labour practice complaint, the Board held that NSCL was not obligated to disclose its plans for an off-site operation when it was not apparent that such plans would have any detrimental effect on the Hamilton bargaining unit – Both applications dismissed

ATIONAL STEEL CAR LIMITED AND UNIVERSAL PLASMA CUTTING LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7135 ..... (Sept./Oct.) 651

Voluntary Recognition – Bar – Certification – Membership Evidence – CUPW asked the Board to find that the voluntary recognition agreement between the UWU and the employer was not a bar to the certification – The Board found there was a different and less stringent evidentiary burden to establish representational entitlement pursuant to section 66 than in furtherance of an application for certification – The Board found that neither the fact that the union registration cards were filled in and signed prior to knowledge of who the employer was to be, nor the fact that the employer's name was added to the registration cards once it became known, rendered the membership evidence invalid or improper – The voluntary recognition agreement entered into by the Employer and the UWU was upheld – Application for Certification dismissed

ISTINCTION SERVICE PLUS INC.; RE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Mar./Apr.) 15

Wilful Misconduct – Discharge – Employment Standards – Timeliness – Evidence – The applicant was terminated from his position as assistant manager of a grocery store following the alleged theft of some apples, an act that he denies doing (his evidence before the Board was uncontradicted) – The Ministry of Labour did not receive the applicant's claim until more than eight months after his termination – The Employment Standards Officer reasoned that she was prohibited from issuing an order under subsection 111(1) of the Act because more than six months had elapsed since the termination of employment – The Board held that the applicant's last day of work was not determinative of the issue since a proper analysis must take into account the nature of the wages and when they became due – The claim for unpaid wages was denied, but vacation pay was awarded – In considering whether the applicant was entitled to termination pay, the Board noted that the employer had simply told the applicant not to report to work until further advised – The Board held that the applicant was entitled to conclude that his employment was terminated 13 weeks after his last day worked; as such, any claim for outstanding wages, including termination pay, was clearly within the parameters of subsection 111(1) – Finally, the Board considered whether the applicant had been guilty of wilful misconduct so as to disentitle him to termination pay: since the employer failed to appear at the hearing (and there was no other evidence available that spoke directly to the alleged offence), there was insufficient evidence to conclude that the applicant was so guilty – Application allowed in part

ASR FOODS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RAFI KALTAKIAN .....(May/June) 440

Witness – *Crown Employees Collective Bargaining Act* – Practice and Procedure – Unfair Labour Practice – The matter involves events that occurred over twenty-five years ago that only came to light recently – The parties asked the Board to first determine whether it had the jurisdiction to hear a complaint that sections of the old CECBA had been breached (assuming the allegations made out a case, the complaint was timely, and the Board would grant a remedy) – Relying on the *Legislation Act*, the Board found that the complainants' rights came into existence under old CECBA, and its repeal did not affect those rights; new-CECBA repealed the old, such that new-CECBA proceedings were to

be followed; and no contrary intention appeared – The Board also noted that rights must be vindicated in some forum and a purposeful analysis leads to the conclusion that the Board's specialized expertise is more appropriate, in these circumstances, than the courts – Accordingly, the Board has the jurisdiction to hear the complaint – Matter continues

OVERNMENT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES; RE OPSEU, ROBERT GORDON, MICHAEL MCKINNON, WILLIAM BRADLEY, ROBERT MOREAU, JOE D'ANDREA AND STEPHEN LONSDALE.....(May/June) 395

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